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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1333

STANDARD ALLIANCE INDUSTRIES, INC.,
*Petitioner,*

*vs.*

THE BLACK CLAWSON COMPANY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Standard Alliance Industries, Inc. petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW.

The opinion of the Sixth Circuit Court of Appeals ("Court of Appeals") is reported at 587 F. 2d 813 (6th Cir. 1978) and is attached as Appendix A (A1-A31). The denial of the petition for rehearing and petition for rehearing en banc is attached as Appendix B (A32).

## JURISDICTION.

The judgment of the Court of Appeals was entered on October 20, 1978. A petition for rehearing and a petition for rehearing en banc were denied on November 30, 1978. The judisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Whether the Court of Appeals adopted a judgment n.o.v. standard which conflicts with this Court's standard and other Sixth Circuit decisions.

2. Whether the Court of Appeals invaded the province of the jury in granting judgment n.o.v.

## STATUTORY PROVISION INVOLVED.

O. R. C. § 1302.65 (UCC 2-607) Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

* * * * *

(C) Where a tender has been accepted:

(1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

* * * * *

## STATEMENT OF THE CASE.

In 1965 the plaintiff, Standard Alliance Industries, Inc. (then known as Standard Forgings Corporation), decided to improve its forging technology. The defendant, The Black Clawson Company, proposed to sell the plaintiff an automatic radial axle forging machine for the purpose of manufacturing railroad axles.



In January, 1965, the defendant sent the plaintiff a proposal (setting forth among other things the specifications for the forging press) to manufacture the machine and, after various meetings, the defendant submitted another such proposal in May of 1965.

Of critical importance to the plaintiff in negotiating a contract to purchase such a forging facility were the performance warranties. The performance warranties which became a part of the contract of purchase dated August 6, 1965, are as follows:

> The following express warranties, which relate to mechanical function only become an adjunct to our contract clause No. 1 page 11 and supersede all references to warranties that may be contained in the description of the machine pages 207, either expressed or implied.
>
> Black Clawson warrants that the subject machinery will perform the following mechanical functions:
>
> 1. Press will deliver 1000 ton ram capacity at 150 strokes per minute, each ¼" from bottom dead center.
> 2. Press will have a maximum speed of 250 strokes per minute—with a range of 10 to 250 SPM.
> 3. Rams at bottom of stroke will have a parallelism of within .005".
> 4. Peel and press will trace template within plus or minus .015".
> 5. Feed adjustments will have a range up to 0.375" per second.
> 6. Peel rotation will have a range of 5 to 100 RPM and will be designed to lock at the 90° positions.
> 7. Peel traverse speed will have a range of 1 ft/minute to 45 ft/minute, and will be designed to lock in position.
> 8. The mechanical functions can be programmed to operate in automatic sequence in the specified capacities and accuracies or may be operator interrupted and/or commanded as required.
>
> The quality and quantity of production is not the responsibility of the seller. Page 12 of Quotation No. 2262, Rev. 2.

The express warranties of mechanical function are commonly referred to as the "Page 12 warranties".

Following numerous design and manufacturing problems, the machine was shipped to the plaintiff in October, 1967. From the time the machine was assembled, the machine did not perform any of the warranted mechanical functions (the Page 12 warranties). The hydraulic operation of the manipulator jaws was defective. The peels would not rotate 90° after each forging blow. The rams would not operate at 250 strokes per minute. The dies would not lock in position. There was no synchronization between the peel rotating speed and ram strokes. The two rams were not synchronized themselves. The machine never operated automatically.

Because of these many problems, Standard Alliance withheld $100,000 of the purchase price and notified the defendant of the plaintiff's dissatisfaction by a letter dated December 27, 1967. The defendant's President, Carl Landegger, responded on January 3, 1968 by letter guaranteeing to the plaintiff that the defendant would work on the machine "until everyone is satisfied".

During the succeeding months, although repair efforts were made, the machine would not operate. The defendant's documents and testimony reveal that its personnel could not get the machine running during this period. In June, 1968, the defendant discontinued its efforts to repair the machine.

Following the defendant's cessation of repairs in June, 1968, one of defendant's engineers, James Gardner, visited the plaintiff's plant on June 26-27, 1968, July 8-11, 1968 and in August, 1968. Each visit concerned problems with the machine's peels. The machine's peels had not operated properly since the machine was first assembled, and their failure to operate had concerned the plaintiff throughout this period.

On May 30, 1969, the plaintiff filed suit against the defendant in federal court on the basis of diversity of citizenship. The plaintiff's complaint alleged breach of express warranty, breach



of warranty to repair or replace defective parts, breach of implied warranty, and negligence and made a claim for backcharges. The defendant counterclaimed for the cost of a spare ram.

In a bifurcated trial, a jury returned a verdict in favor of the plaintiff on the breach of express warranty and breach of the warranty to repair or replace defective parts. The same jury found that the machine could not be repaired and awarded the plaintiff $525,000 in damages. The Trial Court directed a verdict in favor of the defendant as to breach of implied warranty and negligence.

At a separate trial before the Court, the Trial Court found in favor of the plaintiff in the amount of $807.09 plus interest on the backcharges. The Court also found in favor of the defendant in the amount of $25,950 plus interest on its counterclaim.

The Sixth Circuit Court of Appeals reversed the judgment in favor of the plaintiff entered pursuant to the jury's verdict. The Court of Appeals also increased the award in favor of the plaintiff on its backcharges and affirmed the judgment on defendant's counterclaim.

## REASONS FOR GRANTING THE WRIT.

### 1. The Court of Appeals Adopted a Judgment N.O.V. Standard Which Conflicts with This Court's Standard and Other Sixth Circuit Decisions.

This case concerns the invasion by the Court of Appeals of the province of the jury. It accomplished this fact first by adopting a judgment n.o.v. standard which conflicts with this Court's standard and the Sixth Circuit's own decisions and second, when applying this new standard, by selecting segments of the record which supported its conclusion while ignoring those portions of the record which supported the jury's verdict.

At 587 F. 2d 823 (A18), the Court of Appeals set forth its standard for judgment n.o.v. The Court of Appeals stated:

> The standard which defendant must meet is a stiff one. To grant a directed verdict or J.N.O.V., the evidence must be "such that there can be but one reasonable conclusion as to the proper verdict." *Wolfel* v. *Sanborn*, 555 F. 2d 583, 593 (6th Cir. 1977). Ohio's standard is the same. Ohio R. Civ. Pr. 50(A). See *Oday* v. *Webb*, 29 Ohio State 2d 215, 280 N. E. 2d 896 (1972).

The Court of Appeals failed to state the complete standard enunciated in these opinions.

In *Wolfel* v. *Sanborn, supra,* Judge Phillips gave a more comprehensive definition of the judgment n.o.v. standard:

> In reviewing plaintiff's contentions that the directed verdict on the arrest and search issues were improvidently granted by the district court, this court must apply the strict standard that a directed verdict was not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973). Where there is conflicting evidence presented sufficient to raise a material issue of fact, a directed verdict should not be granted, and *credibility of evidence is not to be considered in making the determination. Id.* at 598. [Emphasis supplied.]

The Court in *Oday* v. *Webb, supra,* gave the same complete definition in setting down the Ohio standard. There the Court said:

> Conversely, it is also the duty of a trial court to withhold an essential issue from the jury when there is *not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue. In other words, if all the evidence relating to an essential issue is sufficient to permit only a conclusion by reasonable minds against a party, *after construing the evidence most favorably to that party,* it is the duty of the trial court to instruct a finding or direct a verdict on that issue against that party. 280 N. E. 2d at 889-890. [Emphasis supplied.]



This Court's test is identical to that set forth in *Wolfel* and *Oday. Brady* v. *Southern R. R.*, 320 U. S. 476, 64 S. Ct. 232 (1943).

In determining whether "but one reasonable conclusion as to the proper verdict" exists, a court must not weigh the credibility of the witnesses and must view the evidence in the light most favorable to the plaintiff. The Court of Appeals, however, subtly ignored this most significant part of the n.o.v. standard. By eliminating this half of the test, the Court of Appeals has opened the door for the Court of Appeals to weigh the evidence and substitute its judgment for the jury's.

This Court has corrected similar abuses by a court of appeals in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 79 S. Ct. 921 (1958). The central point of that case was that the district court judge was most familiar with the evidence and the credibility of the witnesses. He determined that the case should have gone to the jury. That decision being correct, the Court of Appeals should not have substituted its decision for the district judge's. 359 U. S. at 447, 79 S. Ct. at 927.

The judgment n.o.v. standard established by the Court of Appeals is at variance with the accepted standard. With this new test, the Court of Appeals seeks to enlarge its jurisdiction. If allowed to stand, the Court of Appeals will, as it did in this case, be permitted to selectively read the record to overturn a verdict which is contrary to its own view of a case. This standard must be rejected.

### 2. The Court of Appeals Erroneously Invaded the Province of the Jury.

As the first section of this petition contends, the opinion of the Court of Appeals established a new and improper test for judgment n.o.v. That the test used by the Court of Appeals was not inadvertent is proven by its analysis of the evidence in the case. The Court of Appeals selectively examined the record

to dredge up facts which supported its conclusion, while completely ignoring facts which supported the jury's verdict.

The focus of the Court of Appeals' application of its standard pertains to the issue of notice. The opinion holds that, while the defendant had *knowledge* of its breach of warranty, the plaintiff failed to give the *notice* as required by § 2-607 of the Uniform Commercial Code. 587 F. 2d at 824-825 (A20-A22).

The Court of Appeals' reversal of the jury's finding that the plaintiff gave the defendant notice only compounds the Court of Appeals' erroneous application of its judgment n.o.v. standard, because the issue of notice is a jury question. See Official Comments to Section 2-607. The Court of Appeals adopted *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F. 2d 957 (5th Cir. 1976). That case holds that the issue of notice is "particularly within the province of the jury." 532 F. 2d at 973. The *Eastern* court stresses that the standard for what constitutes notice is not rigid, and the determination of the sufficiency depends upon the fact finder's examination of the entire course of conduct of the transaction. 532 F. 2d at 978. The Court of Appeals, however, paid mere lip service to this important concept.

The Court of Appeals opinion cited with accuracy some evidence and some exhibits from which the jury could reasonably infer that the defendant had knowledge of its breach of its duty to repair the machine. 587 F. 2d at 824 (A20-A21). The Court of Appeals correctly applied the principle that such an issue is exclusively within the province of the jury and concluded that this evidence was sufficient to support a finding by the jury that the defendant had *knowledge* of the breach of its duty.

The Court of Appeals, however, did a complete turn-around in considering the question of whether the defendant had *notice* from the plaintiff of the defendant's breach of its duty to repair the machine. On this fact question, the Court of Appeals reconstructed the record, weighed the credibility of the witnesses and took the evidence in the light most favorable to the defendant. The Court of Appeals erroneously stated that Black Clawson



was never told after June 21, 1968 that anything was wrong. 587 F. 2d 825 (A21). The Court of Appeals concluded, contrary to the jury's verdict, that Black Clawson had no notice.

There is ample evidence, when taken in the light most favorable to the plaintiff, from which the jury could have reasonably concluded the defendant had notice. The record reflects that a Black Clawson engineer, James Gardner, visited the plaintiff's plant a number of times after June 21, 1968. On each such occasion Gardner's visits included examination or repair of peel problems. The peels were a specific subject of express warranty. Their malfunction was a continuing problem specifically related to the bending and twisting of the axles. The peel problems existed immediately upon startup and were never remedied.[1]

Gardner's next visit after June 21, 1968 was on June 26 and 27, 1968 (Ex. 3700-3701) (A49-A50). During this visit Gardner attempted to remedy the severe bending condition occurring during forging by programming changes in the peel action. Gardner next returned from July 8 through July 11, 1968 (Ex. 3720) (A51). Again Gardner attempted to cure the persistent bending problems caused by the peels. Harold Challman's testimony highlights the lack of success of Gardner's July visit (726a-728a) (A35). The jury was very interested in this visit and, during its deliberations, asked the Trial Court what prompted Gardner's visits (1705a) (A37). This question shows the jury specifically considered the notice issue as instructed by the Trial Court.

Gardner's visits did not end in July. Alfred Romagano, defendant's Vice-President, testified that Gardner returned to the plaintiff's plant for two weeks in August, 1968 and also was there in September, 1968 (1235a; Ex. 3757) (A36; A53-A54).

1. The following citations to the record are examples of testimony concerning the malfunctioning peels. They are reproduced as are other citations to the record as Appendix C (A33-A55).

403a(A33), 690a-691a(A33-A34), 695a(A34), 706a-708a (A34), 726a-728a(A35), Ex. 2412(A40), 2462(A41-A42), 3069-70(A43-A44), 3482(A46), 3493-94(A47-48), 3700-01 (A49-A50), 3720(A51), 3731(A52).

Romagano's August memorandum conceded that the machine was "malfunctioning" and that Gardner was required to return to Standard Alliance for "customer relations" purposes (Ex. 3757) (A53-A54). This evidence belies Romagano's bald statement that Black Clawson did not receive any complaints or notice of customer dissatisfaction after June 21, 1968.

On September 18, 1968, Romagano instructed Mr. Gardner to dissemble if asked about any discussion of peel problems between Romagano and Gardner (1229a; Ex. 3832) (A36; A55).

An examination of the cited exhibits and testimony in the light most favorable to the plaintiff reveals more than slight evidence from which the clear inference can be drawn that the plaintiff notified the defendant of its breach. One can infer that Gardner did not go back to Standard voluntarily. Someone had to call him back. One can infer that "customer relations" were necessary because Standard had notified Black Clawson that it considered them to be in breach. The jury could have inferred from Romagano's scheme of circumventing any confrontation with Harold Challman, plaintiff's employee, regarding the failure to repair the peels that Black Clawson had been notified of its breach.

Notwithstanding such evidence and the reasonable inferences that can be drawn from it, the Court of Appeals concluded that "most" of the contact between the parties after June 21, 1968 was not about defects in the machine. 587 F. 2d at 825, fn. 27 (A21-A22). Implicit in this statement, however, is the concession that some of the contact did concern the defects in the machine and the failure to the defendant to repair them. Further, this characterization of the evidence is itself a weighing process reserved for the jury.

The Court of Appeals employed a double standard by stating that the defendant's *knowledge* of the defects could be inferred from the evidence, while *notice* to the defendant could not be inferred from the same or additional evidence. The jury was



certainly entitled to infer both notice and knowledge from the same facts. Nowhere did the Court of Appeals' opinion state, nor does the Court of Appeals cite any case which holds, that a properly instructed jury is limited in the conclusions it can draw from the facts.

The plaintiff does not assert that other inferences cannot be drawn from the same evidence. However, that is not the test. The question before the Court of Appeals was whether, viewing the evidence *in the light most favorable to Standard Alliance and without weighing the credibility of any of the evidence*, there could be but *one* reasonable conclusion as to the issue of notice. The plaintiff submits that there was more than one reasonable conclusion as is evidenced by the jury's verdict.

The Court of Appeals should not be permitted to ignore evidence supporting the plaintiff's position. Nor should the Court of Appeals be permitted to ignore the jury's specific consideration of the notice issue (1705a) (A37). The jury's finding of notice to Black Clawson was based upon reasonable inferences from sufficient evidence. That finding should be reinstated by this Court.

## CONCLUSION.

For the reasons stated above, Standard Alliance Industries, Inc., requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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## APPENDIX A.

STANDARD ALLIANCE INDUSTRIES, INC.,
*Plaintiff-Appellee,*

*vs.*

THE BLACK CLAWSON COMPANY,
*Defendant-Appellant.*

STANDARD ALLIANCE INDUSTRIES, INC.,
*Plaintiff-Appellee-Cross-Appellant,*

*vs.*

THE BLACK CLAWSON COMPANY,
*Defendant-Appellant-Cross-Appellee.*

Nos. 76-2006, 76-2007.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 13, 1978.

Decided Oct. 20, 1978.

Rehearing and Rehearing En Banc
Denied Nov. 30, 1978.

Robert T. Keeler, Taft, Stettinius & Hollister, Lawrence D. Walker, Cincinnati, Ohio, for defendant-appellant.

Stanley M. Chesley, Waite, Schindel, Bayless & Schneider, Cincinnati, Ohio, for plaintiff-appellee.

Before PHILLIPS, *Chief Judge*, KEITH and MERRITT, *Circuit Judges*.

KEITH, *Circuit Judge*.

This case concerns a machine, a 175 ton "green monster,"[1] more formally known as a horizontal automatic radial forging facility. This machine is the cause of this multi-million dollar breach of warranty litigation between its manufacturer, the Black Clawson Company, (Black Clawson), and its purchaser, Standard Alliance Industries, Inc. (Standard Alliance). After protracted discovery, three separate trials and an unsuccessful mandamus petition to this court, this case comes before us on appeal and cross appeal from the final judgments below.

This litigation principally concerns whether the Black Clawson-built machine was in compliance with certain express warranties. After a four-week trial on the liability issue, a jury found that the machine did not comply with the warranties and, implicitly, that defendant Black Clawson had adequate notice of the breach. That same jury, at a separate trial, assessed damages at $525,000. Finally, at a bench trial, the district court ruled on two peripheral issues arising from the transaction. Black Clawson appeals from the jury's verdict on liability, raising a host of issues. Standard Alliance, although victorious below, cross appeals, complaining that it did not receive the full damages to which it was entitled. Black Clawson also appeals from the damages award. Finally, Standard Alliance appeals from the judgment of the court below, at the bench trial. We reverse the judgment of liability entered at the jury trial and affirm in part, reverse in part, the judgment at the bench trial.

## Facts

This saga began in the early 1960's. Plaintiff, Standard Alliance Industries, Inc.,[2] manufactured railroad car axles, using

1. It was so dubbed by plaintiff's employees.

2. At the time, the company was known as Standard Forgings Corporation. To avoid confusion, we shall refer to plaintiff as Standard Alliance throughout.



the drop hammer method of forging, by which the axles were formed from steel bars by steam hammers. Fearing that its competitors were forging ahead with more sophisticated manufacturing techniques, plaintiff began to actively explore newer technology.

By 1965 the plaintiff determined that it should automate the forging process and purchase an automatic forging machine. There were two manufacturers who could provide such a machine: one was a European concern, known as the GFM company,[3] the other was the Black Clawson Company. Black Clawson had never manufactured an automatic forging machine before, but it did have general experience as a major machine builder.

The plaintiff was swayed by Black Clawson's reputation, its proposed design and its promised fast delivery time.[4] Serious negotiations commenced between the two companies in January of 1965. All aspects of the proposed sale were carefully reviewed and negotiated. A major stumbling block was the warranty. The seller, Black Clawson, did not wish to warrant the quality or quantity of the machine's production. The buyer, Standard Alliance, insisted on a series of performance guarantees, notably a forging cycle of two minutes and a finished axle within certain tolerances. Finally, a compromise was reached. Black Clawson would guarantee that the machine would perform a series of mechanical functions but would not guarantee the quality or quantity of production. A contract was signed on August 16, 1965, excluding implied warranties,[5] but containing certain agreed upon express warranties:

3. GFM stands for *Gesellschaft für Fertingungstechnik und Maschinenbau Ges M. B. H.* literally translatable as Society of Forging Engineers and Machine Builders. We shall at all times refer to this company as GFM.

4. We also note, as did the district judge below, that the GFM machine was much more costly than the Black Clawson machine.

5. Selling Condition No. 9 states in relevant part:

> Any representation, oral or written, any express or implied warranties including but not limited to warranties of merchant-

(Footnote continued on next page.)

The following express warranties, which relate to mechanical function only become an adjunct to our contract clause No. 1 page 11 and supersede all references to warranties that may be contained in the description of the machine pages 2-7, either expressed or implied.

Black Clawson warrants that the subject machinery will perform the following mechanical functions:

1. Press will deliver 1000 ton ram capacity at 150 strokes per minute @¼" for bottom dead center.

2. Press will have a maximum speed of 250 strokes per minute—with a range of 10 to 250 SPM.

3. Rams at bottom of stroke will have a parallelism of within .005".

4. Peel and press will trace template within plus or minus .015".

5. Feed adjustments will have a range up to 0.375" per second.

6. Peel rotation will have a range of 5 to 100 RPM and will be designed to lock at the 90° positions.

7. Peel traverse speed will have a range of 1 ft/minute to 45 ft/minute, and will be designed to lock in position.

8. The mechanical functions can be programmed to operate in automatic sequence in the specified capacities and accuracies or may be operator interrupted and/or commanded as required.

The quality and quantity of production is not the responsibility of the seller.

We shall refer to these warranties as the "page twelve" warranties, as do the parties. The contract further limited the seller's obligations under the warranty to repair or replace defective parts for a one-year period. Selling Condition 1 states:

(Footnote continued from preceding page.)

ability or fitness for a particular purpose and any terms or conditions which are not set forth herein are hereby excluded and shall be of no effect.



1. Seller warrants the equipment manufactured by it will be free from defects in workmanship and material. Equipment manufactured by others than the Seller is sold exclusively under such warranty as the manufacturer may give to the Seller and to the extent enforcible by the Seller. The Seller does not warrant the amount or quality of production unless expressly stated in the specifications. If any part be found within one year from date of delivery to have been defective when delivered (any shortcoming which prevents performance to the specific standards, if any, set forth * being deemed a defect) and provided immediate notification in writing is given to the Seller, the Seller will replace or repair such part. The liability of Seller under this warranty is limited to repair or replacement of the defective part, all damage claims being excluded.
* on Page 12 hereof

Finally, the contract specifically excluded consequential damages for any established breach of warranty.[6]

The contract also contained six pages of technical specifications for the machine and provided for a delivery time of ten to twelve months. The parties have stipulated that the total amount paid for the machine was $571,790.00.

Immediate problems arose. The manufacturing process took longer than expected and many design changes were made while the machine was being built. Finally, in July, 1967, Black Clawson began to ship the machine to Standard Alliance's East Chicago, Indiana plant. Installation was completed by October, 1967.

The machine proved troublesome from the start. On December 27, 1967, Standard Alliance sent a letter to Black Clawson outlining the machine's problems. The parties met to discuss the situation on January 2, 1968. In a follow-up letter, on

6. Selling Condition No. 3 states:

The Seller is not responsible for claims based upon downtime, overhead, labor, damage to machinery, spoilage and loss of production or profit or for consequential damage for any cause arising out of or in connection with this agreement.

January 3, 1968, Black Clawson's president promised that his company would work with Standard Alliance to fix the machine. Accordingly, a team of Black Clawson employees was sent to commence repairs. For over five months, both sides labored to make the machine operable. On June 21, 1968, defendant ceased working on the machine and withdrew its employees.[7]

On September 30, 1968, plaintiff sold its entire Standard Forgings Division to a group of buyers termed "the Wiener Group." The new purchasers also attempted to get the machine to function properly, but with no success. An outside consultant was called in; he pronounced the machine underdesigned and, as a practical matter, irreparable. The instant action was filed on May 29, 1969, almost eight months to the day after Standard Alliance completely disposed of its interests in the machine to "the Wiener Group." On July 14, 1969, "the Wiener Group" began to dismantle and to sell the machine for scrap. Eventually, a new GFM axle forging machine was brought in and put into operation.

## I. The Liability Trial

Plaintiff originally sued under four different theories:[8] 1) breach of the page twelve express warranties; 2) breach of the express warranty to repair or replace defective parts; 3) breach of implied warranties of merchantability and fitness

7. There were two service calls on the machine after June 21, 1968. The first was from July 8 to July 11, 1968, when Black Clawson's James Gardner returned to try to improve the quality of the axles being produced. A memorandum he wrote about the visit indicated that the machine was functioning properly, although this was contradicted at trial by Standard Alliance's Harold Challman.

The second visit occurred on November 7, 1968, when "the Wiener Group" attempted to put the machine into production; Black Clawson was called in to correct a minor electrical malfunction.

8. Plaintiff advanced an additional cause of action dealing with the issue of "back charges." This, together with the defendant's counterclaim, is considered in Part III, *infra*.



for particular purpose; and 4) negligence in the building and installation of the machine. These different causes of action were based on the same factual allegations—despite repair efforts, the machine could not be made to forge axles as it was supposed to. The judge directed verdicts in favor of the defendant on the negligence and implied warranty claims.[9] He then submitted the remaining two claims to the jury: 1) whether defendant had breached any of the page twelve performance warranties in the contract; 2) whether defendant had breached the 'warranty"[10] to repair or replace defective parts. The jury found in favor of the plaintiff on both causes of action. In reality, the two causes of action are synonymous;[11] but they must be separated for purposes of the following discussion.

9. Plaintiff has not appealed from these rulings.

10. Both parties, throughout trial and on appeal, have referred to defendant's agreement to repair or replace defective parts as an express warranty. This provision does appear to meet UCC § 2-313's definition of express warranties in that it is a "promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . ." It is perhaps more accurate to term defendant's promise to repair or replace defective parts as the *remedy* to be invoked if the mechanical performance warranties are breached. This is apparently the view taken in UCC § 2-316 which distinguishes between excluding or modifying warranties and limiting remedies for breach of warranty. *See also* UCC § 2-719. Both parties agree that the repair or replacement of defective parts agreement is a warranty; we need not discuss what important distinctions exist between warranties and warranty remedies. *See Lincoln Pulp & Paper Co., Inc.* v. *Dravo Corp.*, 436 F. Supp. 262, 276-77 (D. Me. 1977); *Ford Motor Co.* v. *Reid*, 250 Ark. 176, 465 S. W. 2d 80 (1971); J. White & R. Summers, Uniform Commercial Code § 12-12 (1972).

11. Count I alleges that the machine failed to meet the page twelve warranties. To find liability, however, the jury must also find that the contract's exclusive remedy or repairing the machine did not or could not cure the defects and thus "failed of its essential purpose." UCC § 2-719. Count II alleges that Black Clawson breached its warranty to repair or replace defective parts. To find a breach, of course, the jury must find that the machine was defective in the first place.

Defendant Black Clawson does not seriously dispute the extensive record of the machine's defects.[12] Instead, it claims that Count I is barred by the statute of limitations and that Count II is barred because Standard Alliance failed to give proper notice as required by UCC § 2–607(3)(a). We agree that these arguments have merit.

A. The Statute of Limitations and Count I

Chronology is important to a precise understanding of the issues. The machine was delivered and assembled at Standard Alliance's plant in the fall of 1967. The machine proved defective, and Standard Alliance wrote Black Clawson on December 27, 1967, delineating exactly what was wrong with the machine and requesting that Black Clawson fix it. Black Clawson worked on the machine until June 21, 1968, when it abandoned repair efforts. This suit was filed on May 29, 1969.

The original contract contained a one-year limitations period; the minimum allowable under UCC § 2–725(1).[13] UCC

12. Both sides kept logs of repair efforts from approximately January to June of 1968 which detailed the machine's deficiencies. Standard Alliance, which had every reason to put the machine into production, was never able to do so, even with defendant's help. The "Wiener Group" also tried to get the machine to work right. An outside consultant they called in concluded that the machine was underdesigned. The "Wiener Group" concluded that the machine could not be repaired, so they eventually scrapped it and replaced it with a GFM machine. Numerous witnesses testified that the machine was defective. Plaintiff's expert witness testified that the machine was so poorly designed and constructed that it could not be repaired so as to meet the page twelve warranties.

13. UCC § 2-725 provides:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement, the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is

(Footnote continued on next page.)



§ 2-725(1) also provides that the limitations period begins to run when the cause of action accrues. UCC § 2-725(2)[14] explains that a cause of action accrues when a breach occurs. A breach of warranty is deemed to occur upon tender of delivery "except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." UCC § 2-725(2). Black Clawson argues that the machine was tendered in the fall of 1967 and that, even granting that the warranty extends to future performance, the cause of action under Count I accrued no later than December 27, 1967, when Standard Alliance wrote its letter claiming that the machine was defective. Standard Alliance makes numerous arguments in reply. Primarily, we must consider the question of when breach occurred. This involves analysis of two separate issues; when tender of delivery was made; whether the warranty extended to future performance. In addition, we must consider various estoppel and policy arguments.

Standard Alliance first contends, with some support in the record, that novel machines like the one here often have long "shake-down" periods before they can be made to function

(Footnote continued from preceding page.)

> made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

14. *See* fn. 13.

properly. The import of its argument is that "tender" of a defective machine should not be deemed to take place until the machine is made to run properly. Since the machine in the instant case did not function properly when initially installed in October of 1967, Standard Alliance argues, tender of delivery was never really made until June 21, 1968, when Black Clawson halted its efforts to get the machine going. Thus, even assuming that the warranty did not extend to future performance, the earliest a breach could have occurred and a cause of action accrued, on Standard Alliance's theory was June 21, 1968.

This argument is plausible, but whithers upon proper examination of the Uniform Commercial Code. UCC § 2-503 (1) defines "tender of delivery" as requiring ". . . that the seller put and hold conforming goods at the buyer's disposition. . . ." Comment 1 to UCC § 2-503 explains that at times "tender" means "due tender" meaning ". . . an offer coupled with a present ability to fulfill all the conditions resting on the tendering party [which must be] followed by actual performance if the other party shows himself ready to proceed." "At other times [tender] is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation." *Id.* We think that "tender" as used in UCC § 2-725(2) is the latter and not the former. A contrary interpretation would extend the statute of limitations indefinitely into the future since a defect at the time of delivery would prevent proper "due tender" from taking place until it was corrected. Under section 2-725, a cause of action accrues upon initial installation of the product regardless whether it functions properly or not so long as the warranty does not extend to future performance. *See Val Decker Packing Co.* v. *Corn Products Sales Co.*, 411 F. 2d 850 (6th Cir. 1969).

Secondly, Standard Alliance argues that the page twelve warranties did extend to future performance under section 2-725 (2), and that the statute of limitations thus ran from the date



of discovery of the defect. It particularly points to the phrase, "Black Clawson warrants that the subject machinery *will* perform the following mechanical functions."[15] Plaintiff's argument proves too much. Since all contracts contain future promises, words of futurity such as "will" are common. When the contract at issue here was signed, the machine was not yet built; the word "will" was necessarily used. The proper question is whether the statute of limitations is meant to run from the day of delivery or from the day when a defect is found sometime in the future.

Most courts have been very harsh in determining whether a warranty explicitly extends to future performance. Emphasizing the word "explicitly," they have ruled that there must be specific reference to a future time in the warranty. As a result of this harsh construction, most express warranties cannot meet the test and no implied warranties can since, by their very nature, they never "explicitly extend to future performance." *See Holdridge* v. *Heyer-Schulte Corp. of Santa Barbara,* 440 F. Supp. 1088 (N. D. N. Y. 1977) (representation of product's condition at time of delivery); *Raymond-Dravo-Langenfelder* v. *Microdot, Inc.*, 425 F. Supp. 614 (D. Del. 1976) (specifications for pier construction); *Binkley Co.* v. *Teledyne Mid-America Corp.*, 333 F. Supp. 1183 (E. D. Mo. 1971), *aff'd*, 460 F. 2d 276 (8th Cir. 1972) (welder performance warranty did not make reference to future time); *Centennial Ins. Co.* v. *General Electric Co.*, 74 Mich. App. 169, 253 N. W. 2d 696 (1977) (one year warranty to repair or replace defective parts); *Voth* v. *Chrysler Motor Corp.*, 218 Kan. 644, 545 P. 2d 371 (1976) (one year auto warranty to repair/replace defective parts); *Beckmire* v. *Ristokrat Clay Products Co.*, 36 Ill. App. 3d 411, 343 N. E. 2d 530 (1976) (implied warranty of merchantability of brick facing); *General Motors Corp.* v. *Tate*, 257 Ark. 347, 516 S. E. 2d 602 (1974) (implied warranty of merchantability

15. This was also the reason why the district court below denied summary judgment and J.N.O.V. on this issue.

of automobile); *Wilson* v. *Massey-Ferguson*, 21 Ill. App. 3d 867, 315 N. E. 2d 580 (1974) (implied warranty of merchantability of tractor).

Two rare examples where express warranties were found to explicitly extend to future performance are *Rempe* v. *General Electric Co.*, 28 Conn. Super. 160, 254 A. 2d 577 (1969) (product was to "work properly for a lifetime") and *Mittasch* v. *Seal Lock Burial Vault, Inc.*, 42 A. D. 2d 573, 344 N. Y. S. 2d 101 (1973) (warranty that vault "will give satisfactory service at all times").

It is clear that a buyer and a seller can freely negotiate to extend liability into the future; that is why specific allowance was made for warranties "explicitly" extending to future performance. *See Raymond-Dravo-Langenfelder* v. *Microdot, Inc., supra* at 618; 2 Anderson on the Uniform Commercial Code, Section 2-725:5, 24 (1970). In the absence of explicit agreement, however, UCC § 725(2), reflecting the drafters' intention to establish a reasonable period of time, four years,[16] beyond which business persons need not worry about stale warranty claims is applicable. This policy consideration underlying § 2-725 makes it acceptable to bar implied warranty claims brought more than a specified number of years after the sale; otherwise merchants could be forever liable for breach of warranty on any goods which they sold. *See Beckmire* v. *Ristokrat Clay Products Co., supra; General Motors Corp.* v. *Tate, supra; Wilson* v. *Massey-Ferguson, supra.* Similarly, an express warranty which makes no reference at all to any future date should not be allowed to extend past the limitations period. Thus, where a manufacturer warrants that a welder will meet certain performance warranties, but makes no mention of how long the

16. We are aware that some states have adopted a limitations period greater than four years, *e.g.* Wis. Stat. § 402.725 (6 years); Okla. Stat. tit. 12 A § 2-725 (5 years). Ohio, however, follows the majority of the states in establishing a four year period. Ohio Rev. Code § 1302.98. The parties agree that Ohio law governs this diversity action.



warranties are meant to last; the statute of limitations begins to run at delivery. *See Binkley Co.* v. *Teledyne Mid-America Corp., supra. See also Holdridge* v. *Heyer-Shulte Corp. of Santa Barbara, supra; Raymond-Dravo-Langenfelder* v. *Microdot, Inc., supra.*

Where, however, an express warranty is made which extends for a specific period of time, *i.e.* one year, the policy reasons behind strict application of the limitations period do not apply. If a seller expressly warrants a product for a specified number of years, it is clear that, by this action alone, he is explicitly warranting the future performance of the product or goods for that period of time. As J. White & R. Summers Uniform Commercial Code 342 (1972), points out, if an automobile is warranted to last for twenty-four thousand miles or four years, the warranty should extend to future performance. If the car fails within the warranty period, the limitations period should begin to run from the day the defect is or should have been discovered.

In the case at bar, Black Clawson expressly warranted the machine for a period of one year. Thus, we hold that the warranties explicitly extended to future performance for a period of one year. Therefore, under § 2-725(2) the cause of action accrued when Standard Alliance discovered or should have discovered that the machine was defective, so long as the defect arose within the warranty period.[17]

17. *Centennial Ins. Co.* v. *General Electric Co., supra,* and *Voth* v. *Chrysler Motor Corp., supra,* indicated that contractual provisions to repair or replace defective parts for a period of one year were not warranties extending into the future for one year, but remedies to be invoked should something go wrong. We see no conceptual distinction between saying that a product is warranted for one year against defects, the remedy limited to repair or replacement and saying that should a breach be discovered within one year, the seller will repair or replace defective parts. Both are warranties explicitly extending to future performance. We recognize that there may be differences between remedies and warranties, *see* fn. 10, but we do not believe that these distinctions make a difference here.

Unfortunately, this holding does not assist the plaintiff. Under the contractual limitations period, Standard Alliance had one year from the date of discovery of defect to bring suit. Standard Alliance reported the machine's problems to Black Clawson by letter on December 27, 1967. At least as of this date, Standard Alliance had discovered the breach. Since suit was not brought until over a year later, on May 29, 1969, this action is barred by section 2-725(2)[18]. *See Gemeni Typographers* v. *Mergenthaler Lino Co.*, 48 A. D. 2d 637, 368 N. Y. S. 2d 210 (1975).

Plaintiff thirdly argues that Black Clawson should be estopped from asserting the statute of limitations as defense because it promised to repair the defects and spent over five months attempting to do so. In effect, plaintiff contends that it reasonably relied on the repair efforts, to its detriment. Decisions in other jurisdictions are split. For cases where alleged reliance on a seller's repair efforts did not toll the statute of limitations, see *Binkley Co.* v. *Teledyne Mid-America Corp.*, *supra* (Missouri law); *Bobo* v. *Page Engineering Co.*, 285 F. Supp. 664 (W. D. Pa. 1967), *aff'd*, 395 F. 2d 991 (3d Cir. 1968) (Pennsylvania law); *Zahler* v. *Star Steel Supply Co.*, 50 Mich. App. 386, 213 N. E. 2d 269 (1973). For cases where the statute was tolled, see *MidCity Finance Co.* v. *Coleman*, 232 So. 2d 918 (La. App. 1970); *Mack* v. *Hugh W. Comstock Assoc., Inc.*, 225 Cal. App. 2d 583, 37 Cal. Rptr. 466 (1964); *Aced* v. *Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P. 2d 897, 12 Cal. Rptr. 257 (1961); *Nowell* v. *Great Atlantic and Pacific Tea Co.*, 250 N. C. 575, 108 S. E. 2d 889 (1959).

We must determine what the Ohio courts would do if confronted with this issue.[19] Although we have been unable to

18. This assumes that we agree with Standard Alliance that the machine was never repaired. Assuming that the machine was repaired at some point, then the failure to give notice of subsequent difficulties would invalidate the claim. *See* Part I(B) *infra*.

19. As noted in fn. 16, there is no dispute that Ohio law controls this diversity case.



find direct case authority, an examination of the statute is illuminative. UCC § 2-725(4), as promulgated by the drafters of the Uniform Commercial Code, states:

> "This section does not alter *the law* on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective." (Emphasis added)

Ohio's version of UCC § 2-725(4) is codified at Ohio Rev. Code § 1302.98(D). That section provides:

> "This section does not alter *sections 2305.15 and 2305.16 of the* [*Ohio*] *Revised Code* on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective." (Emphasis added)

Thus, when the Ohio legislature adopted the Uniform Commercial Code, it substituted "sections 2305.15 and 2305.16 of the [Ohio] Revised Code" for "the law" in the text of UCC § 2-725(4). This significant change in the UCC's wording requires that we limit our analysis to the two Ohio statutes cited.

An examination of these statutes reveals that the limitation period is tolled if a defendant has removed himself from the state, Ohio Rev. Code § 2305.15, or if a plaintiff had suffered from some type of disability. Ohio Rev. Code § 2305.16. Neither is applicable here.

It is, of course, quite possible that the Ohio courts would apply the doctrine of equitable estoppel in a case where an innocent purchaser has relied to his detriment on a seller's promises to repair. "The principle that '. . . no man may take advantage of his own wrong' prevents a defendant whose actions have induced a plaintiff to delay filing a suit until after the running of the limitation period from asserting the statute of limitations as a defense to the action." *Ott* v. *Midland—Ross Corp.*, 523 F. 2d 1367, 1370 (6th Cir. 1975). *See Markese* v. *Ellis*, 11 Ohio App. 2d 160, 229 N. E. 2d 70 (1967). Here, however, we have two corporate behemoths, well able to look

out for themselves, and no evidence that one lulled the other into not suing on time. *See Bowman* v. *Oklahoma Natural Gas Co.*, 385 P. 2d 440 (Okl. 1963).

Standard Alliance's two remaining arguments, unsupported by any authority, merit only brief mention. Standard Alliance argues that this Court should toll the running of the limitations period or otherwise find timely filing because the limitations period was contractually reduced from four years to one year. It would also find significant that approximately one-half the one-year limitations period was spent in attempted repairs.

The one-year limitations period is specifically allowed by UCC § 2-725(1). We see nothing unfair about this provision in a negotiated contract between two parties of equal bargaining power. Similarly, we find no prejudice to plaintiff resulted from the lengthy repair time. Standard Alliance still had time to file suit on the original breach of warranty claim even after termination of the repair efforts; it also had a cause of action under Count II for failure to fulfill the repair or replacement warranty.[20]

B. Notice and Count II

Standard Alliance's claim against Black Clawson is not ended by our decision on Count I. In Count II, Standard Alliance alleges a cause of action for breach of the express warranty to repair or replace defective parts. This cause of action, which is virtually identical to Count I,[21] was not barred by the statute of limitations.[22] Thus, even if Standard Alliance

20. Our disposition of Count I on limitations grounds makes it unnecessary to consider the interesting question whether notice of breach had to be given a second time, after repairs failed. Since the repair or replacement warranty is also a remedy to be invoked if the machine did not meet its performance warranties, there is certainly room to argue that UCC § 2-607(3) requires notice that the repair or replacement remedy has failed "of its essential purpose" under UCC § 2-719(2).

21. *See* fn. 11.

22. Black Clawson terminated its repair efforts on June 21, 1968; suit was filed within a year's time, on May 29, 1969.



sued too late on its claim that the machine was defective, it did sue on time on its claim that Black Clawson failed to repair the machine.

Black Clawson concedes that suit on Count II was timely filed, but strongly argues that it had no knowledge that anything was wrong with the machine after it quit work on it and that plaintiff's failure to report the machine's defects barred the suit.

To recapitulate: The machine was installed in October of 1967, and plaintiff's employees attempted to make it operable. A letter was sent to Black Clawson on December 27, 1967, fully outlining the machine's defects. Black Clawson responded by sending a team of employees to try to fix the machine. These employees were at Standard Alliance's plant for over five months. On June 21, 1968, Black Clawson's repairmen left Standard Alliance's plant, never to return. Plaintiff claims that this action constituted knowing abandonment of the unrepaired machine. Black Clawson claims that it thought that the machine was satisfactorily repaired and that it knew nothing about any further problems.

The controlling statute is UCC § 2-607(3)(a) which provides:

> "The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

Whether proper notice was given is a question of fact, *Eastern Air Lines* v. *McDonnell Douglas Corp.*, 532 F. 2d 957, 973 (5th Cir. 1976); *Lynx Inc.* v. *Ordinance Products, Inc.*, 273 Md. 1, 327 A. 2d 502, 512 (1974); *L. A. Green Seed Co. of Arkansas* v. *Williams*, 246 Ark. 463, 438 S. W. 2d 717, 720 (1969). *See E. C. Ernst* v. *General Motors Corp.*, 537 F. 2d 105, 108 (5th Cir. 1976) (applying contract notice provision); *Pritchard* v. *Liggett & Myers Tobacco Co.*, 295 F. 2d 292, 298 (3d Cir. 1961) (applying Uniform Sales Act);

*Columbia Axle Co.* v. *America Automobile Ins. Co.*, 63 F. 2d 206, 208 (6th Cir. 1933) (applying Uniform Sales Act). *See also* 2 Anderson on the Uniform Commercial Code § 2-607:24 (1970).

Moreover, inasmuch as section 2-607 operates as a condition precedent to any recovery, the burden of proof is on the plaintiff to show that notice was given within a reasonable time. *Ehlers* v. *Chrysler Motor Corp.*, 226 N. W. 2d 157, 159 (S. D. 1975); *Schnabl* v. *Ford Motor Co.*, 54 Wis. 2d 354, 198 N. W. 2d 161 (1972); *L. A. Green Seed Co. of Arkansas* v. *Williams, supra,* 438 S. W. 2d at 719-20.

The district judge submitted the notice issue to the jury, which found for the plaintiff. The question presented here is whether the district judge erred when he refused to overrule the jury's decision and enter judgment N.O.V. for the defendant.

The standard which defendant must meet is a stiff one. To grant a directed verdict or J.N.O.V.,[23] the evidence must be "such that there can be but one reasonable conclusion as to the proper verdict." *Wolfel* v. *Sanborn*, 555 F. 2d 583, 593 (6th Cir. 1977). Ohio's standard is the same.[24] Ohio R. Civ. Pro. 50(A). See *O'Day* v. *Webb*, 29 Ohio St. 2d 215, 280 N. E. 2d 896 (1972). If the evidence is clear, however, a court can rule as a matter of law that a party failed to give proper notice. *Clow Corp.* v. *Metro Pipeline Co., Inc.*, 442 F. Supp. 583, 588-91 (N. D. Ga. 1977); *Cotner* v. *Int'l Harvester Co.*, 260 Ark. 885, 545 S. W. 2d 627 (1977).

23. The standards for the granting of a directed verdict and judgment N.O.V. are the same. *Oneil* v. *Kiledjian*, 511 F. 2d 511, 513 (6th Cir. 1975); *Holt* v. *Continental Insurance Co.*, 325 F. Supp. 283 (E. D. Tenn.), *aff'd*, 440 F. 2d 652 (6th Cir. 1971); Ohio R. Civ. Pro. 50(A).

24. We are bound by state law as to the sufficiency of the evidence. *Chumbler* v. *McClure*, 505 F. 2d 489, 491 (6th Cir. 1974).



The notice requirement of Section 2-607 is explained by Official Comment 4:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designated to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.
>
> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defect upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Some courts and commentators have taken the liberal view that almost any kind of notice of dissatisfaction is sufficient. "Quite clearly the drafters [of the UCC] intended a loose test; a scribbled note on a bit of toilet paper will do." J. White & R. Summers Uniform Commercial Code 347 (1972). *See e.g., Lewis* v. *Mobil Oil Corp.*, 438 F. 2d 500, 509 (8th Cir. 1971); *Metro Investment Corp.* v. *Portland Rd. Lumber Yard, Inc.*, 263 Or. 76, 501 P. 2d 312 (1972). Other courts have required more than minimal notice where both parties were merchants engaged in on-going transactions. *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F. 2d 957, 970-980 (1976); *Kopper Glo Fuel, Inc.* v. *Island Lake Coal Co.*, 436 F. Supp. 91, 95-97 (E. D. Tenn. 1977). *See Cotner* v. *International Harvester Co., supra. See also Fischer* v. *Mead Johnson Laboratories*, 41 A. D. 2d 737, 341 N. Y. S. 2d 257 (1973).

There is no dispute that Standard Alliance gave timely notice that the machine was not in compliance with the performance warranties and that Black Clawson then spent over five months trying to fix the machine. The dispute concerns whether defendant was properly notified that the repairs were inadequate.

Black Clawson's argument can be conveniently subdivided into two subparts. First, it contends that it understood the machine to be operating properly on June 21, 1968, and that it had no knowledge that the machine was defective after that date. Second, it contends that it had no notice that Standard Alliance considered it to be in breach of the warranty to repair or replace defective parts.

The jury's implicit finding[25] that Black Clawson had knowledge that the machine was defective and improperly repaired is supportable by the evidence. Black Clawson Vice-President Romagano did testify that he thought that the machine was repaired on June 21, 1968, and that he had no idea anything was wrong afterward. The jury, however, could have disbelieved this testimony, relying on a June 24, 1968, memo written by Mr. Romagano which reveals that the machine suffered repeated failures on both June 20, 1968, and June 21, 1968. In addition, the jury could have credited letters written in June, July and August of 1968 from Mr. Romagano to a Black Clawson subcontractor, Reliance Electric Co., complaining about the failings of the machine's electric drive, a critical component. Finally, the jury could have believed expert testimony that the machine was so poorly designed that it could not be made to operate in synchronization nor be repaired to meet any of the express warranties. If so, the jury could have reasonably inferred that defendant was aware that its attempts to repair were an utter failure. Thus, there exists evidence to support a jury

25. The district judge properly instructed the jury on the notice issue. At the subsequent trial on damages, the same jury made the explicit finding that the machine was irreparable.



finding that Black Clawson had knowledge that it was in breach of the repair or replace warranty.[26]

The critical issue is whether Black Clawson had notice that it was considered to be in breach. Black Clawson emphatically argues that there is no evidence at all that it received notice of breach after it quit repair work on June 21, 1968. Standard Alliance directs us to none, and our independent examination of the record reveals none. Incredible as it may seem, Black Clawson quit repair work on June 21, 1968 and was never told anything was wrong until May 29, 1969, when suit was filed.[27]

26. The evidence is not one-sided, however. The record indicates that the machine would operate, but was subject to breakdowns and produced a poor product. Repair efforts at times achieved temporary success or offered the hope of success. For example, in a July 15, 1968 internal memorandum, Standard Alliance's Harold Challman indicated that with two weeks of certain indicated repairs, the machine would be ready to make a production run. There thus exists some basis for Black Clawson's subjective belief that the machine was in compliance with the page twelve warranties. Internal Black Clawson memoranda, notably an October 3, 1968 memo from Vice-President Romagano to President Landegger support this belief.

This confusion further underscores the need to give clear notice; especially in a commercial setting where two companies have interacted at different levels, from President to maintenance worker.

27. Black Clawson pressed this issue at trial. Standard Alliance's President Erwin Schulze admitted that no written notice was sent; he did not know whether oral notice was given. Executive Vice-President William G. Shaw, who at the time was head of Standard Alliance's forging division, knew of no communication between the parties concerning the machine's defects after June 21, 1968. Roy W. Clansky, a Standard Alliance Vice-Chairman of the Board intimately involved in the machine's purchase, testified that Black Clawson never failed to respond when called. He did not recall ever getting in touch with his counterpart at Black Clawson to complain about the machine after January 4, 1968. Russel E. Reum, Standard Alliance's purchasing agent, knew of no notice to Black Clawson indicating dissatisfaction with repair efforts after January of 1968. Black Clawson Executive Alfred Romagano testified that Black Clawson never heard a complaint about the machine after June of 1968.

The evidence in the record concerning the circumstances of Black Clawson's termination of repair efforts on June 21, 1968, shows an amicable parting after months of mutual cooperation. Contacts between the parties after June 21, 1968, were minimal and most had nothing to do with the machine's defects. Standard Alliance invited

(Footnote continued on next page.)

Standard Alliance argues that it fully informed Black Clawson of the machine's defects at the beginning and that Black Clawson abandoned the machine knowing that it was defective and unrepaired. Under these circumstances, the question presented is whether it was necessary to give additional notice of the failure of repair efforts.

We think that notice should have been given. Section 2-607 expressly requires notice of "any" breach. Comment 4 says that notice "need only be such as informs the seller that the transaction is claimed to involve a breach." The express language of the statute and the official comment mandate notice regardless whether either or both parties had actual knowledge of breach. *See Cotner* v. *International Harvester Co., supra.*

We also note that this same result would take place under § 2-607's predecessor, section 49 of the Uniform Sales Act.[28] Judge Learned Hand's oft-quoted words applying section 49 are equally applicable here:

> The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose

(Footnote continued from preceding page.)
Black Clawson to a trade association tour of its plant in September, 1968, and discussed settling "backcharge" claims for repairs. In addition, two brief service calls were made. Although the record as to the service calls and backcharge negotiations is sketchy, *see* fn. 7 and 34, there is no evidence that the issue of breach of warranty was ever raised directly, and Standard Alliance does not argue that it was.

28. Section 49 provided:

> In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.



> of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

*American Mfg. Co.* v. *United States Shipping Board E. F. Corp.*, 7 F. 2d 565, 566 (2d Cir. 1925), *cited with approval in Columbia Axle Co.* v. *American Automobile Ins. Co.*, 63 F. 2d 206 (6th Cir. 1933). *See Eastern Air Lines* v. *McDonnell Douglas Corp.*, 532 F. 2d 957, 971-972 (5th Cir. 1976); *Bloch* v. *Eastern Mach. Screw Corp.*, 281 F. 777 (6th Cir. 1922); *Champion Animal Food Co.* v. *L. B. Reich Distributing Co.*, 78 N. E. 2d 180 (Ohio App. 1947).

An examination of the policy reasons which underlie 2-607 further support our view. Notice of breach serves two distinct purposes. First, express notice opens the way for settlement through negotiation between the parties. Comment Four, *supra; Eckstein* v. *Cummins*, 41 Ohio App. 2d 1, 321 N. E. 2d 897, 901 (1974). Second, proper notice minimizes the possibility of prejudice to the seller by giving him "ample opportunity to cure the defect, inspect the goods, investigate the claim or do whatever may be necessary to properly defend himself or minimize his damages while the facts are fresh in the minds of the parties." Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. Fla. L. Rev. 520, 522 (1973). *See Eastern Air Lines* v. *McDonnel Douglas Corp., supra*, at 972-73. *Compare* 3 Williston on Sales (4th Ed.) § 22-11 and J. White & R. Summers, *supra* at 344 which identify three policy reasons behind the notice requirement: 1) To enable the seller to make adjustments or replacement or to suggest opportunities for cure; 2) To enable the seller to prepare for negotiation or litigation; and 3) To give the seller peace of mind from stale claims. *See Steel & Wire Corp.* v. *Thyssen, Inc.*, 20 U. C. C. Rep. 892 (E. D. Mich. 1976). *See also Mattos, Inc.* v. *Hash*, 279 Md. 371, 368 A. 2d 993, 996 (1977) (protection against stale claims is the purpose of the statute of limitations, not the purpose of section 2-607(3)).

We do not know whether this lengthy, acrimonious lawsuit could have been settled beforehand. We do know that Standard Alliance's failure to give notice precluded the possibility of compromise.

More important, the record contains evidence suggesting the kind of prejudice which 2-607's notice requirement seeks to avoid. After Standard Alliance sold its Forgings Division to "the Wiener Group" on September 30, 1968, Wiener attempted to put the machine into operation. When that failed, the machine lay dormant. On May 28, 1969, the day before suit was filed, Standard Alliance, in cooperation with Wiener, started the machine and filmed its malfunctions. On July 14, 1969,a scant six weeks after suit was filed. Wiener began to dismantle the machine. Although Black Clawson was informed of the machine's sale,[29] it never inspected the machine after terminating repair efforts on June 21, 1968, nor was it aware that the machine was to be destroyed.

Standard Alliance contends that the destruction of the machine by a third party was proper and the Black Clawson was remiss in not seeking to inspect the machine during the six-week period after suit was filed, but before the machine was destroyed. This ignores the realities of the litigation process. Six weeks is an insignificant period of time in a case such as this which has dragged on for over nine years. In addition, it was pure chance that the machine was destroyed when it was; Wiener could have taken the machine apart whenever it wanted. Had Black Clawson gotten even minimal notice that it was being held in breach, it might very well have sought inspection and perhaps even made its own film of the machine.

Measuring the impact of potential prejudice here is, of course, difficult since Black Clawson was unable to have its own experts examine the machine. Standard Alliance emphasizes that Black

29. Black Clawson claimed in its brief that it did not know of the sale to "the Wiener Group." The record is clear to the contrary and Black Clawson conceded the point in its reply brief.



Clawson designed and built the machine and worked on it for over five months. As the machine's creator, it arguably did not need to inspect it. Also, the evidence that the machine was defective was overwhelming. On the other hand, preparing for litigation is a *sui generis* task. Black Clawson may have been able to put on a spirited defense, especially as to damages, had it gotten early notice and followed up by inspecting the machine. Whatever the degree of prejudice to Black Clawson, UCC § 2-607's notice requirement is designed to forestall the very difficulties which developed here. While we see no justification for the strong language in defendant's brief charging a conspiracy to hide the facts and destroy the machine, we think that this case demonstrates the wisdom of section 2-607's requirement of prompt notice.

Black Clawson also raises independent objections to the film and the circumstances of the machine's destruction, arguing that it should have had specific advance notice of both the film's production and of the machine's demolition. We need not decide these issues. We do note, however, that this Court has never sanctioned the sporting theory of justice. Adherents of the theory among the bar are reminded that a law suit is a serious matter; there is no room for games of hide and seek. Neither the federal rules nor statutory law can anticipate every twist and turn which can take place in litigation. "Legal" moves by ingenious litigants will not be countenanced where injustice would result.

These events further demonstrate the merit in those cases which hold merchants to higher standards of good faith than consumers. *See Eastern Air Lines* v. *McDonnell Douglas Corp., supra,* at 977; *Kopper Glo Fuel, Inc.* v. *Island Lake Coal Co., supra* at 96. Black Clawson and Standard Alliance worked together at all times. Black Clawson responded promptly when informed that the machine was not working properly; commercial good faith mandated that it be told that repair efforts had failed and that it was being held in breach. A new car buyer can be excused for failing, in ignorance and exasperation, to notify a

car dealer of an obvious breach after persistent repair efforts have ended in failure. A merchant like Standard Alliance cannot be so excused, it should have met section 2-607's non-rigorous notice requirements.

Standard Alliance points to two cases, *Ernst* v. *General Motors Corp.*, 482 F. 2d 1047 (5th Cir. 1973), *appeal following remand*, 537 F. 2d 105 (5th Cir. 1976), and *Metro Invest. Corp.* v. *Portland Rd. Lumber Yard, Inc.*, 263 Or. 76, 501 P. 2d 312 (1972), for the proposition that proper notice, once given, is sufficient for all related breaches. Standard Alliance's position is that since it concededly gave proper notice that the machine was defective on December 27, 1967, it did not have to give notice later on that repair efforts to cure the defects had failed.

We reject this argument. In *Ernst, supra,* the court merely concluded that a letter complaining of delays in the start-up of a construction project could be reasonably construed to encompass problems caused by severe winter working conditions which would not have occurred but for the delay. Also, the court did not think that once initial complaint about delay was made, that additional notice of delay had to be given on a regular basis. In *Metro Invest. Corp., supra,* the buyer gave prompt notice of a defect. The parties met and agreed to wait and see if the defect improved. The Oregon Supreme Court found that the initial notice was sufficient, even though no complaint was made for two years thereafter.

In the instant case, the two warranties are distinct and notice serves different functions for each. When the machine was found to be in breach of the page twelve performance warranties, notice was necessary so that Black Clawson could come in and try to fix the machine. When repair efforts failed, and Black Clawson was allegedly in breach of its warranty to repair or replace defective parts, notice would alert Black Clawson that Standard Alliance thought that repairs were defective and that perhaps litigation was contemplated. At this point, the parties could have discussed settlement, and Black Clawson could have



sought evidentiary support for its position that the machine was indeed repaired. Black Clawson was alerted that the machine was defective, but not alerted that its repair efforts were defective. We cannot allow notice of one breach to be carried over to create notice of a subsequent related, but distinct, breach.

We realize that our holding bars what is apparently a meritorious claim. Standard Alliance's inexplicable failure to give any notice whatsoever that Black Clawson was in breach of its repair/replace warranty is fatal; underlying standards of commercial good faith, codified in UCC § 2-607, mandate this result.

Our ruling makes it unnecessary to consider the numerous other issues raised concerning the liability or the damages trial.

## II. Prejudicial Contact with the Jury

Although unnecessary to our decision, an additional issue warrants mention. As indicated, trial on liability was separated from trial on damages; the same jury, however, was to hear both. The jury returned its verdict on liability on September 12, 1975. Black Clawson contends that immediately after the liability verdict, Standard Alliance's counsel improperly approached two jurors as they were approaching an elevator in the Federal Courthouse and thanked them for their verdict.[30] Black Clawson claimed improper contact and promptly filed a motion for mistrial, with accompanying affidavits as to what had transpired. Instead of summoning the attorneys and interrogating the jurors on the record or otherwise proceeding to openly test the validity of the motion, the district court, without notice to either party, sent his law clerk to interview the jurors about the alleged incident. The court concluded, on the basis of this

30. It does not appear from the record that the district judge issued a cautionary instruction to the jury that it not discuss the case with anyone after it rendered its verdict as to liability. Since the same jury was to later hear evidence as to damages, such an instruction would have been in order.

ex parte communication, that any jury contact which had taken place had been trivial.[31]

The court might very well have been correct, but the manner in which it made the determination was improper. The correct response of a trial judge, when confronted with allegations of improper jury contact, is to give notice to the parties and to question the jurors on the record about any alleged incident.[32] *See Petrycki* v. *Youngstown & Northern Ry. Co.*, 531 F. 2d 1363 (6th Cir.), *cert. denied*, 429 U. S. 860 (97 S. Ct. 161, 50 L. Ed. 2d 138 (1976); *United States* v. *Gay*, 522 F. 2d 429 (6th Cir. 1975). *See also United States* v. *Florea*, 541 F. 2d 568, 572-73 (6th Cir. 1976), *cert. denied*, 430 U. S. 945, 97 S. Ct. 1579, 51 L. Ed. 2d 792 (1977).

Ex parte contact between judge and jury raises a presumption of reversible error. *Petrycki* v. *Youngstown & Northern Ry. Co., supra,* at 1367; *United States* v. *Gay, supra,* at 435. In *United States* v. *United States Gypsum Co.*, ..... U. S. ....., ....., 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978), the Supreme Court warned of the dangers of ex parte contact between a judge and any member of the jury. The court found reversible error when a meeting between the trial judge and a foreman, which had been consented to by the parties, was allowed to drift into what "amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict . . ." ..... at ....., 98 S. Ct. at 2886. *See also Rogers*

31. This incident was the subject of a mandamus petition to this Court, which was dismissed as moot after the damages trial commenced.

32. Black Clawson's affidavits presented a *prima facie* case of impropriety, sufficient to require a formal inquiry. Cf. *Mattox* v. *United States*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892). The district judge apparently agreed, because he sent his law clerk to ask the jurors what had transpired. Under these circumstances, we need not decide what allegations of improper jury contact are required before an inquiry must be made or when failure to make an inquiry is reversible error. *See South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F. 2d 767, 791-92 (6th Cir. 1970), *cert. denied*, 402 U. S. 983, 91 S. Ct. 1662, 29 L. Ed. 149 (1971).



v. *United States*, 422 U. S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975); *Fillippon* v. *Albion Vein States Co.*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853 (1919). Here, the length and nature of the law clerk's contact with the jury is unknown. No record was kept, no notice was given to the parties. Under these circumstances, the presumption of prejudicial error cannot be rebutted. This alone would have required reversal, at least of the damages verdict rendered by the same jury after the incident took place.[33]

## III. The Bench Trial

At a separate bench trial, the district court ruled on two matters which were peripheral to the main suit. The first issue concerned "back charges." Selling Condition No. 15 of the contract provided:

> In no event shall any installation, erection, modification, or corrective work be done by the buyer for the account of the seller until after full particulars (including an estimate of material cost, amount, and rate of labor required) have been submitted in writing to and approved in writing by the seller. Returned items will not be accepted unless seller has previously agreed to such return in writing and supplied written shipping instructions.

Plaintiff, in Count IV of its complaint, claimed that it incurred a total of $55,247.84 in these charges. The district judge found that plaintiff had not complied with the contract's Selling Condition, *supra,* and allowed only $807.09 of this amount.

We think that the evidence fairly reveals that the parties made an express oral modification of Selling Condition No. 15, which operated as a waiver of Black Clawson's rights under this section of the contract. Although, under Ohio law, courts must look carefully at oral modifications of a written contract, *White Co.*

33. There is no need to discuss Black Clawson's claim that this error would require a new trial on the liability issue as well. *See Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1931).

v. *Canton Transportation Co.*, 131 Ohio St. 190, 2 N. E. 2d 501, 505 (1936), if the evidence is clear, a waiver can be found. *See Ohio Farmers Ins. Co.* v. *Cochran*, 104 Ohio St. 427, 135 N. E. 537 (1922). Harold G. Challman, plaintiff's "man in charge," testified without contradiction that he and Black Clawson employee James Gardner had agreed that Standard Alliance would keep a running total of expenses incurred while the machine was being worked on. Two internal memoranda authored by Black Clawson executive A. P. Romagano support this testimony.[34] Standard Alliance and Black Clawson worked together for over five months trying to get the machine to perform properly. In light of their almost daily interaction, it made good sense for Standard Alliance to keep a running tab on the back charges instead of continually going to Black Clawson for written approval. This type of good faith conduct by the parties should be encouraged, not discouraged.[35]

34. Mr. Romagano's memorandum of August 22, 1968 states that "Standard [Alliance] is going to present us with what I suspect is a very sizable bill for back charges." Yet, instead of indicating that the bill was unenforceable, he requested information from another company official for bargaining purposes. In an October 3, 1968, memorandum, Mr. Romagano notes that Mr. Challman (of Standard Alliance) had called him and indicated that back charges would be between $55,000.00 and $60,000.00. Instead of disclaiming liability, Mr. Romagano said that he thought that the charges could be settled for between $20,000.00 and $25,000.00.

35. Mutual modification of a contract may also implicate the hoary preexisting duty rule which invalidates a contractual modification made without consideration. *See Hariott* v. *Marine*, 96 Ohio App. 174, 121 N. E. 2d 305 (1953). The rule has been properly criticized as an artificial obstacle to good faith contract changes, *see* Note, *The Preexisting Duty Rule of Foakes* v. *Beer—a Victory by Default for Stare Decisis*, 11 Ariz. L. Rev. 344 (1969), and has been discarded by the authors of the Uniform Commercial Code, *see* UCC § 2-209. In this case, assuming that the rule applies, we find valid consideration, because Standard Alliance, by agreeing to keep a running tab, was precluded from immediately collecting back charges. This forced forebearance benefitted Black Clawson, as illustrated by the fact that it was not until October of 1968 that it was even informed of the charges. *See Boymer* v. *Birmelin*, 227 So. 2d 358, 362 (Fla. App. 1969); 1 Williston on Contracts § 135 (3rd Ed. 1957). *Cf. DeCicco* v. *Schweitzer*, 221 N. Y. 431, 117 N. E. 807 (1917).



Although the district judge, in his findings of fact below, questioned the amount of the charges, we see no need to remand. Standard Alliance's unchallenged ledger entries, kept pursuant to the oral agreement between the parties, are fully adequate to support its claim.

The second issue decided at the bench trial, dealt with defendant's counterclaim. In early 1968, Standard Alliance determined to purchase a spare ram and piston assembly for the machine. Black Clawson agreed to sell the spare ram to Standard Alliance for $25,950,000. It is uncontroverted that although delivered late, the ram was accepted but never paid for. The district court found no evidence that the ram was unsatisfactory or what it failed to meet specifications.[36] Accordingly, we have no trouble affirming the district judge's entry of judgment for Black Clawson on its counterclaim.

In conclusion, we reverse the judgment entered pursuant to the jury's verdict on the issue of liability for breach of warranty. We also reverse the judgment entered by the district court on Count IV of the complaint and remand with directions to enter judgment for Standard Alliance for $55,247.84. Finally, we affirm the judgment entered for Black Clawson on its counterclaim.

Each party is to bear its own costs.

36. Standard Alliance argues that the parties agreed that if the ram on the machine failed within one year, there would be no charge for the replacement ram. This directly contradicts the purchase order which provided for 50 percent payment within 90 days, with the balance due in one year. The district court's resolution of this evidentiary clash in favor of Black Clawson was not clearly erroneous. Rule 52, F. R. Civ. Pro.

## APPENDIX B.

No. 76-2006
No. 76-2007

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

STANDARD ALLIANCE INDUSTRIES, INC.,
*Plaintiff-Appellee-Cross-Appellant,*

*vs.*

THE BLACK CLAWSON COMPANY,
*Defendant-Appellant-Cross-Appellee.*

ORDER

Before: PHILLIPS, *Chief Judge,* KEITH and MERRITT, *Circuit Juc'ges.*

Counsel for Standard Alliance has filed a Petition for Rehearing with Suggestion for Rehearing en banc. No judge of this Circuit having voted for en banc consideration, the Petition has been referred to the hearing panel. Also before us is a Petition for Rehearing filed by Black Clawson.

We believe that the issues raised in both petitions were adequately dealt with in our opinion. Nor are we inclined to disturb our determination that each party bear its own costs. Further, we see no need to change the wording of this court's judgment.

The petitions are in all respects denied.

Entered by Order of the Court
/s/ John Hehman
*Clerk*

November 30, 1978



## APPENDIX C.

**Excerpts from Joint Appendix.**

Q. I believe I was asking, Mr. Challman, about the synchronization of this machine and then you were explaining and I didn't mean to interrupt you. Could you tell me, sir, was there a problem with the synchronization of this machine? First of all, was there a problem relative to keeping the peels and rams in synchronization? A. Yes, that is what I have been explaining. The peels, when they are under load, could not synchronize and turn 90 degrees between every impact to the ram.

Q. Was that a constant problem? A. That was a constant problem and sometimes it would revolve enough so that it would eventually turn into a round, but as I have said, we kept reducing the speed of the rams, but the machine could have been and was set up to operate at twice that speed.

(P. 403a)

Q. Mr. Challman, you indicated that the Black Clawson engineer gave you permission to do this or made this program.

Could you tell us, sir, who that person was? A. He was the one that instigated it, that was Jim Gardner.

Q. He was an employee of the Black Clawson Company? A. He was employed by Black Clawson.

Q. Tell me, sir, during this period of time, the latter part of '67 and beginning of 1968 and during this period, was he on the job at Standard Forging Company in East Chicago? A. Periodically he was on the job at East Chicago.

Q. And could you tell us, sir, what some of the things were that he was doing or attempting to do in relation to this machine, particularly in early 1968? A. Well, we had various prob-

lems, as I have mentioned, with the peels. And the rotation of the peels when under load would never rotate 90 degrees between impacts.

And to do proper forging this is the way that that machine was supposed to operate.

And in talking about this to Jim Gardner, he gave me one explanation of why it would not do this, that the peel was so large and there was so much massive weight out away from the center line, that it was too much weight plus the weight of the billet to have the peel rotate and pick up enough speed to rotate 90 degrees between every impact of the hammer or of the press dies.

And I could see it was the same thing when the dies came together to stop the peel, that the peel would keep turning because of this excess weight, and this created a twist in the outer surface of the steel, which was very, very pronounced.

(pp. 690a-691a)

Q. Were the peels ever able to go 62 and a half per minute? A. But not under load, but they did turn that speed when they were running idle—not running idle—but when they had no load in the peels, they were able to rotate at that speed when they were just running by themselves.

(p. 695a)

Q. Now, sir, I will ask you, sir, if you would describe just briefly what some of the problems were during this period commencing on March 20th, 1968 up through and including May the 10th, 1968? A. Well, it's similar to problems, to what we had earlier, and that is we still could not get the peel to rotate properly with a billet in it. And there was various problems that cropped up at different times. And there was—as mentioned here on the 28th, we had problems with the rotation of the peel stopping at right angles, which I have already talked about earlier. And—



(pp.706a-707a)

Q. Now, I want to direct your attention to the conclusion of Mr. Gardner's report, and it certainly could be wished that he would write a little better than he does, but down at the conclusion, would you please direct your attention to that part of the report where he talks about the program appearing satisfactory and the decision being made to heat up the furnace and run axles on July 10. Do you see that? A. Yes.

Q. Now, Mr. Gardner says, Mr. Challman, here that a total of eight billets were run and all appeared to be straight and reasonably to size. A. That is the part that I take exception to. I did not get this memorandum, and I am not agreeing with that statement. We still had a swing or a bent axle, and we still had vibration in the machine, which was also causing this condition.

Q. Did you make a report on July the 10th or July the 11th to indicate that Mr. Gardner is not stating the fact that would help us? A. I do not recall, because I do not remember ever seeing this memorandum when we were in production, or trying to make axles.

Q. How about the rest of Mr. Gardner's statements after that, "No bending could be directed during the pre-form or body finish passes and shock on the peels appears less than normal. The ends were cut off and the eight axles were centered and checked in a lathe for runout. Two of the eight had some runout, but it was suspected that these were bent during unloading." That would leave six apparently that weren't bent. Do you recall checking them in the lathe and doing all that? A. No, I do not. And two would not be bent by handling after they had been—when they were brought over to the other side.

Q. If Mr. Gardner had given you this report at the time you would have said, "That's not the way it was, Jimmy, that's not true"; is that right? A. That is correct.

(pp. 726a-728a)

Q. And, your Honor, I will ask that that memorandum be given again to Mr. Romagano which is No. 3832.

(Exhibit handed to the witness.)

Directing your attention, sir, to the last paragraph of that memorandum of 9/18/68 from you, Mr. Romagano, to Mr. Gardner, I direct your attention to the last paragraph in which it is stated: "Should a question arise relative to peel modifications, respond that Romagano had nothing to say about this and Gardner had not discussed it specifically with Romagano."

Do you remember writing that, sir? A. Yes.

(p. 1229a)

Q. Sir, you were talking about Mr. Gardner. You indicated that you never went back to the plant after June 21; is that correct, sir, of 1968? A. That's right.

Q. Mr. Gardner went back, didn't he? A. Yes.

Q. He went back in July, August and September? A. Approximately July and August. Perhaps September. I am not sure.

Q. And, sir, aside from the call report that was shown to the jury dated July 13 or 14, you don't have any memorandum, do you, of Mr. Gardner's trips in either July, August or September to the Standard Forgings Company of 1968? A. I think we have some July reports, have we not?

Q. That was the one that was a flimsy or a transparency that was shown to the jury of July, I believe, 8 to 11. I am asking you, sir, aside from that one were there any others? A. I believe there is a November report.

Q. November 1. My question, sir, was directed to July, August and September. A. Other than that one in July and November, we have seen no others. Mr. Gardner was in the plant assisting on programming in that period which he had reported.



(p. 1235a)

8:50 P.M.

September 12, 1975.

(Chamber conference.)

The Court: We have received this question from the jury: "We would like the notification that prompted the visit by Jim Gardner of Black Clawson to Standard Forgings that is described in Exhibit 3720." We have brought in Exhibit 3720.

(p. 1705a)

HAMILTON DIVISION

Date: 3/27/67

M. McCarthy, R. Muck,
J. Gardner, C. Mulcahey
Industrial Products Sales File

From: A. P. Romagano

Standard Forge File Ref. C-164-67

The following will summarize the points covered and actions to be taken resulting from our session held this morning on the open items to be completed for the Standard Forge job:

1. Hydraulic System
   a. Hydraulic vendor to be in Wednesday to check pump and piping to determine what has to be done relative to the pump.
   b. Hydraulic system to be checked out and made operative by the shop with coordination through Gardner.
   c. It appears that the one pump on the hydraulic system will have to be replaced.

2. Skirts for ram
   a. Engineering must design skirts to cover the rams at the center forging section of the press. This skirting arrangement must be such as to protect the oil from the fall of slag and water. Some manner must be determined to seal all possible any water getting into the ways, etc. so as to not foul the lubrication system.

3. Revise lubrication system
   a. We are to design and construct complete revision to the lube system consisting of two tanks and pumps. One is to be at either end of the press serving the entire lubri-



cation of that half of the press. The pumps are 400 psi duty at 5.7 gallons per minute. The system requires a heat exchanger to handle a requirement of an 80 degree temperature drop at 6 gallons per minute. If at all possible a standard heat exchanger should be used so that we can expedite the completion of this system.

4. Oil
   a. Shop to pump out oil and return to vendor for the inclusion of additives to make the oil suitable for 150 degree operation. That is the viscosity characteristics will not be changed at this temperature.
   b. Check with the oil vendor to determine a standard brand of oil commercially available which will have essentially the same physical and operational characteristics as the present oil being used. [Ex. 2411]
   c. Check the flash point of the present oil.

5. Tape System
   a. It has now been determined that it is an absolute requirement that the peels be synchronized in their rotation. Accordingly it is necessary to order these changes to the peel.
   b. Engineering to check the tape response with black tape to determine whether or not the tape system is operative or is there a potential problem.
   c. Engineering to coordinate with the shop to check out the tapes on the operation and rotation of the turrets.

6. Lubrication system drawings
   a. Have Fletcher get into the shop and draw up schematics of a lubrication system. Rather than copying exactly what we have, we should clean up some of the manifolds and other hodge podge of make shift piping arrangements.

b. It has been decided that we will re-pipe this job prior to shipment in order to clean up the system.

7. Peels

a. At the request of Challman of Standard Forge we will order bigger pumps in order to speed up the operation of the peel jaws. This is to be a charge to Standard Forge. Gardner is to look up a price and give this information to Dawson of the Sales Department. Sales should then get off a formal quotation and letter to Mr. Challman so that this matter can be cleared up.

8. Load Test

a. Shop will continue to test the rubber bumpers under the static press roll. Hydraulic press to determine whether or not the rubber bumpers will adequately handle the test involved on the forging press.

There is a possibility that the rubber will heat up and create a problem. It is for this reason that the synthetic Fabrecka substitute. Vendor advised us that the material suggested by Mr. Challman will not work under the proposed service required for testing the press.

[Ex. 2412]



HAMILTON DIVISION

Date: 4/21/67

M. F. McCarthy, R. E. Muck,
C. W. Mulcahey,
J. Gardner
R. K. Dawson
Standard Forge

From: A. P. Romagano

File Ref. D-188-67

The following summarizes the various points covered and actions to be taken resulting from our review of current job status held the evening of April 20.

1. Tape control system

The following items are remaining problem areas to be checked out by the Datex representative:

(a) Shut height

(b) Swing arm solenoid problem

(c) Die turret—SCR to be replaced—Affects reversal of one turret.

(d) Determine status of the peel rotation synchronization. This work requires new engineering and component parts from Datex. This whole subject was discussed with Reliance some weeks ago.

(e) Correct counter on peel longitudinal movement along the track (Gardner to supply information).

(f) Conduct a final total check on all the tape systems to be assured that everything is functioning properly before the Datex representative leaves.

(g) Check the swing arm circuit on the No. 1 arm. Be assured that this is functional since there was a prob-

lem on the circuit for swing arm No. 2. This should be able to be done without a complete installation of the No. 1 arm.

(h) Determine the peel stock position relative to the square billet and swing arm jaws to the peel jaws (Check with Gardner).

2. Reliance System

(a) Reliance to make a final adjustment and synchronization at 250 strokes per minute.

3. Lubrication

(a) Bill Hill to supply information relative to fire retardant oil.

(b) Mr. Challman to be supplied with specifications on fire retardant oil.

4. Mechanical

(a) Modify rings on peel No. 1 main cylinder. This cover the drilling of the rings to improve rotation of peel. Check with engineering to determine how far we go with the drilling. If no definite conclusion and decision forthcoming from engineering advise McCarthy. McCarthy will then call in Shartle hydraulic engineers if necessary.

[Ex. 2462]



## STANDARD FORGINGS

80 East Jackson Boulevard, Chicago, Illinois (Illegible)
(Illegible)

December 27, 1967

Mr. Ray Dawson
Black-Clawson Company
2nd & Vine Streets
Hamilton, Ohio 45011

Dear Mr. Dawson:

On December 21, 1967, a meeting was held with your Mr. Gardner and Mr. Mulcahy to discuss some of the problems we continue to have with the Axle Forging Press. Representing Standard Forgings were Messrs. Oaklund, Challman, Bryzgalski, Gruca, Langer, and the writer.

The points covered at this meeting were:

1. The ram cylinder controls are not reliable. We only have a reading on the No. 1 ram and must assume that No. 2 will be identical which is not necessarily true. There should be a read-out for each individual ram.
2. The press has not been run at full potential of 250 rpm. This should be done on a continuous basis for at least 8 hours.
3. We are experiencing a considerable amount of mis-synchronization of machine functions which are directly attributable to the electrical system.
4. Present manner of presenting forging stock to No. 1 Peel lacks enough accuracy for true line-up with press forging dies.
5. Swing arms should also have positive anchoring to overcome misalignment of stock. Positive stops should be provided for opening and positioning of swing arms.

[Ex. 3069]

6. The clamping action of the peel is much too slow. Peel rotating pressure is too extreme and should be reduced to eliminate twisting of stock.
7. Press frame should be re-inforced for more rigidity, both in the structure and at the foundation.
8. Peel rails should be more positively secured to the press frame. At present, there is not sufficient provision for anchoring.
9. Extreme vibration has resulted in loosening of practically all fasteners in the equipment. Shakeproof or nylon insert type fasteners should be considered.
10. Repair of the leak in the ram by a plugging method is questionable. What provision will be made for replacement?

We wish to point out our comments are observations and we would certainly be inclined to think your engineers that have been in attendance here to see the machine operated, have also noted areas of design and detail requiring modification and rework.

Naturally, with the considerable amount of time having elapsed since the inception of our purchase order, we are gravely concerned about placing the equipment into profitable production on a continuing schedule.

In view of all the problems we are experiencing we feel a meeting of company representatives is definitely in order and request this be held on January 4, 1968 at our plant. Mr. Romangano should be in attendance as he was present at a similar meeting with our company president's, Mr. Clansky and Mr. Landegger. The importance of the meeting is of mutual benefit to accomplish the operation of the press as intended.

May we hear from you promptly verifying the meeting date?

Yours very truly,

Russell E. Reum

*General Purchasing Agent*

[Ex. 3070]



STANDARD FORGINGS

A Division of Standard Alliance Industries, Inc.
Indiana Harbor, Ind.

May 1, 1968

In Reply Please Refer to

To: Mr. R. Oaklund

Subject: Axle Forming Machine
—Page 2—

Friday

April 26, 1968

Finished installing the booster on No. 2 peel. Installed the positive stops on No. 2 swing arm. Decided to forge axles and fired up furnace at 10:00 A.M. Four pieces of stock placed in furnace. There was no time to add stops to die turrets and we could operate without them by manually placing the dies in their starting position. Tried the first piece in late afternoon and the press went out of synchronization when forging the body. Tried the next piece with the furnace temperature at 2400°F. When forgoing the first journal, it would not revolve fast enough and this journal was not properly formed. After the trial it was decided to change the type and rotate faster. Finished new tape about 1:00 A.M.

Saturday

April 27, 1968

Held furnace at about 1800°, so an axle could be tried early in the morning. Tried the new tape on several dry runs. Made one axle up to the body forging operation, when an overload of 200% occurred per Reliance man, and the press again went out of synchronization. We made a new tape No. 108, which has more reduction in the preforming operation on the body of the axle. Tried the tape about 6:15 P.M. and then the un-

loading swing arm was not acting properly. On the next dry run, the No. 1 peel did not stop when the probe was hit and this bent the probe rod support. This all showed the Datex was erratic. Shut down furnace at 7:15 P.M. Per Reliance service man, he stated the numerical control units had to be kept warm. The door was closed and after some time had elapsed, we again made several dry runs with a log and it seemed to work properly. Started furnace at 10:30 P.M. with eight pieces in the furnace. Tried to forge first piece at 1:20 A.M. and on the preform the rotation stopped and bent the stock. On the second piece of stock, the operation was erratic and started to revolve on the No. 1 transfer before the corners had been rounded. They called and tried to get Datex service man and then we shut down for the night.

H. G. Challman

HGC:nr
cc.
W. B. Schulze
R. W. Clansky, Jr.
J. P. Lynch
R. E. Reum
W. Gruca
E. Bryzgalski
J. Gardner—Black Clawson

[Ex. 3482]



THE BLACK CLAWSON COMPANY
Hamilton Division

Date: 5/13/68

Memo to the File
From: A. P. Romagano
Standard Forge/Action Program

File Ref. E-48-68

The following items were reviewed with Gardner, Mulcahey and Protzman Saturday, May 11 for immediate follow up at the Standard Forge job site:

1. Set the rams at "0" synchronization mechanically.
2. Swing arms
   (a) Dowel the swing arm side plates on the No. 1 swing arms
   (b) Adjust the valves on both swing arms
      (1) Speed up action of swing arms—open orifice holes in valves
      (2) Install Viton seals
3. Vertical posts on end peel rails—Mulcahey to get construction started immediately at Hamilton. He is then to review how the posts can be secured in the concrete floor at the job site.
4. Billet drop guard at dies—Mulcahey to start manufacture at Hamilton immediately.
5. Peel
   (a) Check bypass valves—getting sluggish—probably a seal problem
   (b) Check accumulators for peel rotation shock absorber—Whitworth suggested that the accumulators may be installed wrong side up. Gardner to check.

(c) Braces for hydraulic lines which ride on peels—Gardner to check the feasibility of adding a few braces at critical spots on the peels to minimize the vibration on the hydraulic lines.

(d) Repair leaks at the leather boots in the peel which serve as the longitudinal movement shock absorber.

(e) Add a second finger to the rear end of each peel (rotation stops)

(f) Add longer springs to No. 1 peel

(g) Order several sets of Viton seals for Schaeffer cylinders

6. Press

(a) Must develop a means to reduce oil splashing at the center of press at the dies. Possibly some form of shield for the dies that are not in operation might suffice.

[Ex. 3493]

(b) Tighten electrical box on the No. 1 turret.

7. Reliance Drives

Drives appear to lose synchronization under load and are not meeting specifications as far as synchronization of No. 1 and No. 2 rams are concerned.

8. Challman agreed to relieve the journal dies at one end. This should tend to minimize the overload condition somewhat.

[Ex. 3494]



[The following is a transcription of Exhibits 3700, 3701 and 3720 which are Black Clawson engineer, James Gardner's handwritten "Call Reports" with reference to the axle forging machine. Portions of the handwriting are unclear. These are marked with a—.]

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: 397-6600 (219)

Contacts: H. Challman
W. Gruca

Summary of call: The following tapes were tried with the intent of eliminating or reducing axle bending encountered during body forging: (6-27-68)

1. Tape No. 126 at 120 SPM time 10:30 a.m. (Tape 125 is identical to tape 125 except all body forming operations are done while pushing rather than pulling) Results: Bending was more pronounced. The "dog-leg" appeared during the plunge, and more bending occurred along the pre-form. The program was stopped just after the body forming due to lack of clearance.

2. Tape No. 125 at 180 SPM time 11:00 a.m. (An attempt to establish a speed vs. bending correlation) Results: the normal bend occurred at the pre-form and possibly slightly less occurred at the body forming. There appeared to be no significant relation between—speed and bending (con't. sht. 2).

[Ex. 3700]

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings Corp.

Summary of call: (Con't., from sht. 1)

3. Tape No. 129 at 120 SPM 3:45 p.m. Tape 129 rounds in normal manner, forms No. 1 journal, transfer to No. 2 peel and then forms body (pulling) with 3 passes with body finish die, and forms No. 2 journal. The No. 1 peel clamps the free end at the end of the last body pin to attempt to straighten. Results: the No. 1 journal end remains straight and pre-forming and body finishing perform satisfactorily, however the resulting "dog-leg" at the No. 2 end was not straightened by the No. 1 peel jaws.

4. Tape No. 128 at 120 SPM 4:15 p.m. (tape 128 is identical to 125 with an additional pass over the body and wheel rest with the roughing die). Results: the "dog-leg" bend re-appeared while passing over the body but to a lesser degree. The finished forging was straightr (sic).

[Ex. 3701]



BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings Corp.

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: (219) 397-6600

Contacts: H. Challman
W. Gruca
E. Oakland

Summary of call: Subject—Axle Forging Press The purpose of this call was to try an alternate forging program in an attempt to eliminate bending of the product. (Challman elected to delay any runs during this week of 7-1 due to the holiday and their shutdown on 7-5). The program involves turning the No. 1 peel with the No. 2 peel while both grip the product. The installation of a two-way valve was necessary to allow the No. 1 peel to free-wheel. This work was completed on 7-9 (Tues.) and some dry runs were made to check the tapes and the free-wheeling action. The program appeared satisfactory and so a decision was made to heat up the furnace and run axles on 7-10 Wed.). A total of 8 billets were run and all appeared to be straight and reasonably to size. The bending could be detected during the pre-form or body finish process and shock on the peels appeared less than normal. The ends were cut off and the 8 axles were centered and checked (last line unclear).

[Ex. 3720]

STANDARD FORGINGS DIVISION
Chicago, Illinois

July 15, 1968

To: W. H. Murphy
B. Oaklund

Subject: Axle Forging Press

The following details should be taken care of and worked upon, so that a production run can be made.

1. Bevel the peel jaws so stock will have easier entry into the jaws.
2. Add brackets on top of the peels on traverse hydraulic line and on 4-way valves to reduce vibration.
3. Check and correct if necessary, the peel jaw alignment. No. 1 peel with square stock and No. 2 peel with round stock to eliminate possible bending of finished axle.
4. Install oil boots on both peels. (Shipment promised 7-19 out of Milwaukee.)
5. Install proper seals in peel pumps and inspect other hydraulic items for seal leakage.
6. Check hydraulic fittings on the Shut Height Mechanism.
7. Reinstall the Reliance Cooling Fan in Panel.
8. Clean scale out of furnace.
9. Install positive mechanism for dumping the stock off of the furnace cart.
10. Install sump pump in the scale pit.
11. Hook up the water cooling lines.
12. Install a safety rail around the center die opening on the top of the machine.

[Ex. 3731]



THE BLACK CLAWSON COMPANY
Hamilton Division

From. A. P. Romagano

To: Byron Long

Subject: Standard Forge Field Service

Date 8/22/68

File Ref. H-172-68

Byron, in the event that I don't have an opportunity to discuss this with you beforehand, please go back through the record and determine how many days Jim Gardner has been at Standard Forge since all of us returned to Hamilton sometime in May. I don't recall the specific timing. But there was a certain break point at which we stopped in order to have the major rework done, the installation of beams and some other work which Standard Forge themselves wanted to have done at that time. You will recall that it took them three, four or five weeks to accomplish all of this work due to the slowness with which they approached it. While we had not achieved 100% success at this particular time, we were certainly very far along.

Now the thought occurs to me that Standard Forge is going to present us with what I suspect is a very sizeable bill for backcharges. Therefore I would like to have all of the ammunition of additional charges that I can get my hands on which are reasonable and legitimate. As you and I have discussed a number of times, we took entirely too much time in the field but the facts being as they are, this was the result of the machine malfunctioning. However, it seems to me that since I returned from Standard Forge in May we have had Gardner up there many, many days, most of which fell into the category of customer relations in the first place, and secondly into the category that

these people never really bothered to get an operator to learn how to run the machine. For example, these last two weeks is completely unrealistic as far as what should be expected of us.

In any event, I don't really think that I will collect any money for this but I certainly would like to have a bll for "x" thousand dollars for field service plus expenses to counteract any numbers which Standard Forge has. Accordingly, please check the days that Jim has been there since May using our field service charge, I think it is a $100 or $125 a day, then add up all of his expenses in that same period. We can then have what amounts to an invoice prepared even though it is not my intent to send it yet. In this way I will have some figures to work on in any discussion with Standard Forge. The reason this comes to my mind is that as things are now developing, I rather feel that Gardner is going to have to be at Standard Forge next week because they still haven't finished their own work on this thing. Please get this together as soon as you can.

[Ex. 3757]

APR/ai



THE BLACK CLAWSON COMPANY

Hamilton Division

Date: 9/18/68

File Ref. I-181-68

To: Jim Gardner

From: A. P. Romagano

Subject: Standard Forge

Please call Mr. Challman of Standard Forge and tell him the following:

1. Romagano called Gardner and requested he call Challman since Romagano is tied up with budget meetings in New York and was unable to call Challman directly.
2. Romagano thanks Mr. Challman for his offer to permit Black Clawson to join in the forging institute tour being conducted at Standard Forge but Romagano unfortunately is tied upon on the corporate budget review and cannot make it to Chicago on Thursday.
3. Mr. Muck already had other appointments set up and similarly will be unable to attend. Mr. Muck will be in the general area and will make every effort to get in Thursday afternoon but it is so indefinite that it is better for Mr. Challman to plan that we will not be there at all.

Should a question arise relative to peel modifications, respond that Romagano had nothing to say about this and Gardner had not discussed it specifically with Romagano.

[Ex. 3832]

APR/ai

Supreme Court, U. S.
FILED
APR 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-1333**

STANDARD ALLIANCE INDUSTRIES, INC.,

*Petitioner,*

*v.*

THE BLACK CLAWSON COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-1333**

STANDARD ALLIANCE INDUSTRIES, INC.,

*Petitioner,*

*v.*

THE BLACK CLAWSON COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Black Clawson Company opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this diversity case because petitioner has advanced no special or important reasons warranting this Court's review.

### Statement of the Case

Respondent agrees with petitioner's statement of the case subject to the following corrections and amplifications.

The negotiations for respondent's manufacture and sale and petitioner's purchase of the forging machine spanned

seven months from January to August, 1965. From the start, petitioner wanted respondent to warrant that the machine would forge one railroad car axle of suitable quality every 2½ minutes having certain precise dimensions and specifications. Respondent refused to do that. A forging machine of the kind the parties contemplated had never before been built, and respondent knew nothing of the fine craft of forging.

When respondent refused to warrant the quantity or quality of forgings to be made on the proposed machine, negotiations nearly terminated. The parties were at an impasse. Nevertheless, after its attorneys and executive officers reviewed respondent's final proposal, petitioner agreed to the contract sued on in this case. That document explicitly excluded all implied warranties of fitness and merchantability and further conspicuously declared:

> The quality and quantity of production is not the responsibility of the seller.

Following delivery of the machine, which weighed 175 tons, respondent immediately answered petitioner's written and oral demands that it perform the express contract warranty to repair or replace those parts of the machine which were defective in workmanship or materials or caused deficiencies in the machine's functioning as warranted on page 12 of the contract. For over five months respondent worked at both petitioner's and its own plant making modifications, repairs, and replacements.

Respondent completed performance of the repair and replacement warranty on June 21, 1968. Both respondent and petitioner believed that the former had fulfilled its contract obligations by that date, and respondent left petitioner's plant receiving amicable expressions of appreciation, gratitude, and satisfaction from petitioner.



The machine itself could be operated both manually and by computer. With the latter, computer programs had to be prepared which gave the machine commands as to what types of movements to perform in order to shape the desired end product. Respondent had no obligation to prepare petitioner's computer programs. The machine's output was up to petitioner.

When respondent completed its repairs on June 21, 1968, petitioner advised that it would soon contact respondent by telephone for its assistance in training a computer programmer and for its thoughts regarding different types of programs and forging techniques. Respondent complied with petitioner's request and dispatched James Gardner to petitioner's plant in late June, July, August, and September, 1968 to assist petitioner's employees in preparing computer programs and to discuss forging techniques.

There is no evidence that petitioner at any time after June 21, 1968 notified respondent that it considered the latter's performance of the repair and replacement warranty to be deficient or that it deemed it in breach of that warranty. Instead, petitioner's witnesses uniformly denied that any such notification had been given.

Because of this fatal deficiency in petitioner's case, respondent moved for a directed verdict and judgment notwithstanding the verdict. The District Court never ruled on the motion for a directed verdict and denied the motion for judgment notwithstanding the verdict without opinion.

After its own "independent examination of the record," the Court of Appeals unanimously found that there was no evidence of notification and held that judgment notwithstanding the verdict should have been granted (A21).*

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* The Court of Appeals' opinion is Appendix A to petitioner's brief, and all citations to the Sixth Circuit's opinon are to petitioner's Appendix A.

Precisely the same grounds urged here for a writ of certiorari were dismissed by the Sixth Circuit when it denied petitioner's petition for a rehearing *en banc*, "no judge of this Circuit having voted for *en banc* consideration."

Petitioner here maintains that the Court of Appeals' "independent examination of the record" was deficient and that this Court should now conduct yet another appellate inquiry to see if there is any substantial evidence of notice. Petitioner's plea does not present a reason for a writ of certiorari.

## A Writ Should Not Be Issued

### 1. The Court Of Appeals Did Not Adopt A New Standard For Judgment Notwithstanding The Verdict

Petitioner's first reason for obtaining a writ is that the Court of Appeals purportedly established a new standard for granting judgments notwithstanding the verdict. As petitioner pointed out, the standard is the same under both Ohio and federal law. *See, e.g., O'Day* v. *Webb,* 29 Ohio St. 2d 215, 280 N.E. 2d 896 (1972); *Brady* v. *Southern R. Co.,* 320 U.S. 476 (1943).

The essence of petitioner's claim is that the Sixth Circuit created a new standard in this case because of what it quoted or did not quote from its prior opinion in *Wolfel* v. *Sanborn,* 555 F.2d 583 (6th Cir. 1977). Petitioner openly adopts the standard in *Wolfel* as the correct test, but contends that the Court of Appeals here adopted a different standard because it did not expressly refer to the following portion of that case in its opinion here:

> Where there is conflicting evidence presented sufficient to raise a material issue of fact, a directed verdict should not be granted, and credibility of evidence is not to be considered in making the determination. (555 F.2d at 593)



Petitioner claims that the Court of Appeals "subtly ignored" that portion of the judgment n.o.v. standard quoted above and also contained in *O'Day* v. *Webb, supra,* 29 Ohio St. 2d 215, 280 N.E. 2d 896 (1972). That statement could not be further from the truth. The Court of Appeals explicitly found that there was no issue of conflicting evidence or credibility of evidence in this case:

> The critical issue is whether Black Clawson had notice that it was considered to be in breach. Black Clawson emphatically argues that there is no evidence at all that it received notice of breach after it quit repair work on June 21, 1968. *Standard Alliance directs us to none, and our independent examination of the record reveals none.* (A21; emphasis added)

This is not a case where the appellate court recognized the existence of a conflict in substantial evidence and then allowed a judgment n.o.v. Nor is it one where a reviewing court openly considered the credibility of evidence and then permitted a judgment n.o.v. Instead, this is an action where the parties and the court itself—after its own independent and exhaustive examination of the record—could find no conflict in the evidence and where the question of credibility of evidence never even arose.

The fact is the Court of Appeals here did not "ignore," revise, or truncate the established standard for judgments n.o.v. It did not specifically mention what petitioner claims was ignored because that portion of the standard was unimportant here. As the Court of Appeals noted, not even petitioner could point to any evidence of *notice* (A21).

Since there was a complete absence of evidence on notice, the Court of Appeals properly allowed a judgment n.o.v. under the accepted standard. As Professor Moore has stated:

> The directed verdict is normally used in two overlapping categories of cases. *First, where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense.* This is the situation that historically gave rise to the device of the directed verdict. Second, where there are no controverted issues of fact upon which reasonable men could differ. 5A *Moore's Federal Practice* (2d Ed.) ¶50.02 [1] at p. 2317; emphasis added.

Petitioner has totally misrepresented the Court of Appeals' opinion. The Sixth Circuit did *not* explicitly or implicitly adopt or apply a standard for judgment n.o.v. different from that heretofore established by this Court, other circuits, or the Ohio courts. Indeed, it specifically cited the authorities petitioner is advancing here as stating the appropriate standard (A18).

"There can be but one reasonable conclusion as to the proper verdict" when there is "a complete absence of proof on an issue material to a cause of action." That conclusion is a verdict for the defendant. The Court of Appeals adopted and properly applied the accepted test for judgment n.o.v. in this case.



**2. The Court Of Appeals Properly Granted Judgment Notwithstanding The Verdict**

Petitioner has not and cannot maintain that this Court should issue a writ of certiorari because the Court of Appeals erroneously decided an important question of state law, or because it decided an issue in conflict with that of another circuit, or because it so egregiously departed from accepted norms of judicial proceedings as to warrant the exercise of this Court's supervisory powers. All petitioner requests is that this Court conduct its own independent and exhaustive examination of the record in this diversity action to see if there is any evidence of substance which would preclude a judgment n.o.v.

Not a single one of the reasons for issuing a writ of certiorari established by this Court in its Rule 19 has been advanced by petitioner. In this breach of contract action arising under Ohio law, all petitioner wants is a determination by this Court that Judges Phillips, Keith, and Merritt did not sufficiently review the extensive record in this case for evidence to support the jury's verdict. To invoke such a reason here is to misconstrue the proper role of this Court in appellate practice. *See generally Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 at 447 et seq. (1959) (Frankfurter, J., dissenting).

The sole basis for petitioner's claim is that the Sixth Circuit either overlooked or improperly evaluated certain evidence. It asserts that, since an inference could arise that respondent had *knowledge* of alleged contract performance deficiencies, an additional inference could be drawn that petitioner gave respondent *notice* that it was claiming a breach of contract. Petitioner's desire to extrapolate one inference from yet another inference should stop further inquiry and require a denial of its petition.

The Sixth Circuit answered petitioner's argument and held that knowledge was not sufficient to establish notice (A21-A23). Its holding is in conformity with those of other circuits and the Ohio courts. *See, e.g., Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957 at 973 (5th Cir. 1976) ("[I]t is not enough under section 2-607 that a seller has knowledge of the facts constituting a nonconforming tender; he must also be informed that the buyer considers him to be in breach of the contract."); *Charles* v. *Judge & Dolph, Ltd.*, 263 F.2d 864 (7th Cir. 1959) (buyer's notice to seller of defects is not notice of breach); *Texas Motorcoaches, Inc.* v. *A.C.F. Motors Co.*, 154 F.2d 91 (3rd Cir. 1946) (buyer must clearly and unambiguously inform the seller that it considers the seller in breach); *American Mfg. Co.* v. *United States Shipping Board E.F. Corp.*, 7 F.2d 565 at 566 (2d Cir. 1925) ("The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of the buyer's claim that they constitute a breach."); *Champion Animal Food Co.* v. *L.B. Reich Distributing Co.*, 78 N.E. 2d 180 at 182 (Ohio App. 1947) (A seller's knowledge of breach is not "evidence of notice of any kind that a claim for damages because of late delivery was ever given."); *Eckstein* v. *Cummins*, 41 Ohio App. 2d 1 at 6, 321 N.E. 2d 897 at 901 (Ohio App. 1974) (The notice must "inform the seller that the transaction is claimed to involve a breach").

Petitioner also argues that the Court of Appeals purportedly "overlooked" evidence that one of respondent's employees was at petitioner's plant on four different occasions after performance of the repair and replacement warranty was completed on June 21, 1968. Again, this statement is incorrect. The Sixth Circuit specifically alluded to that evidence and stated:

> Although the record as to the service calls and backcharge negotiations is sketchy, *see* fn. 7 and 34, there is no evidence that the issue of breach of warranty was ever raised directly, and Standard Alliance does not argue that it was. (A22)



Respondent's employee James Gardner went to petitioner's plant in late June and again in July, August and September at petitioner's direct request that assistance be provided in programming matters and forging methods (725a-726a, 1053a-1055a, 1235a; Exhs. 3700-3701, 3720).* There is no evidence that Mr. Gardner undertook these trips in response to a notice of breach or that, during his visits, petitioner gave the required notice. In fact, petitioner's own witnesses denied that any notice of breach was given after June 21, 1968 when repairs were completed (A21-A22).

Mr. Gardner's visits to petitioner's plant, as the Court of Appeals found, did not constitute evidence of notice of breach sufficient for this case to go to the jury. In *Gunning* v. *Cooley*, 281 U.S. 90 (1930), this Court held:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (281 U.S. at 94).

It is clear that, under both federal and Ohio law, a scintilla of evidence is not sufficient to present a jury

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* The references to the Joint Appendix before the Court of Appeals are attached hereto as an addendum.

question. There must be a conflict in substantial evidence. *See, e.g., Magnat Corp.* v. *B & B Electroplating Co.*, 358 F.2d 794 (1st Cir. 1966); *Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F.2d 467 (4th Cir. 1963); *Moore* v. *Johnson*, 568 F.2d 1184 (5th Cir. 1978); *Lovas* v. *General Motors Corp.*, 212 F.2d 805 (6th Cir. 1954); *Hohmann* v. *Packard Instrument Co., Inc.*, 471 F.2d 815 (7th Cir. 1973); *Hamden Lodge* v. *Gas Co.*, 127 Ohio St. 469, 189 N.E. 246 (1934).

The essence of the petition to this Court is that the three experienced judges on the Sixth Circuit who conducted their own "independent examination of the record" in this diversity breach of contract case erred in failing to draw an inference and in finding certain evidence insufficient to present a jury question. Petitioner has neglected to explain how this circumstance warrants the issuance of a writ here. More important, it has failed to cite any authority that the Court of Appeals did in fact err.



## CONCLUSION

Petitioner has not shown and has not seriously maintained that the Court of Appeals devised a new standard for judgment n.o.v. in this case. The essence of its plea is that this Court determine *for this case only* what permissible inferences may be drawn from certain evidence and whether other evidence amounts to more than a scintilla. No attempt was made to explain how a ruling by this Court on any alleged error presented will leave its fresh imprint on anyone other than the two parties to the case.

Petitioner has presented no special or important reasons why this Court should exercise jurisdiction over this diversity case arising under Ohio law. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[ADDENDUM FOLLOWS]

## ADDENDUM

### Joint Appendix 725a-726a

Q. Now, Mr. Challman, Mr. Romagano and the big mass of Black Clawson employees who were working on the machine leave some time in June, latter part of June, '68.

Will you accept that date? A. I think so, yes.

Q. And then, sir, let's move on into July of 1968.

You were going to have a plant vacation, weren't you, from about the middle of July, 1968 until the middle of August 1968; remember that? A. There was a vacation period in July, yes.

• • •

Q. . . . Romagano and his crew leave toward the end of June. Then we come to July 8th to 11th, and I am asking you if you have a recollection that between July 8th and 11th Jimmy Gardner of Black Clawson came back primarily to work with Bryzgalski and with you, of course, on programming. See if they couldn't improve the programming. And let me tell you a little more, straighten out the axles. Do you remember that? A. Yes, there was a—they had—Jim Gardner had an idea of coming—moving the dies in to hit the hot material after it had been forged to try and improve the straightness on the hot piece of steel or on the hot axle.

Q. You remember that visit now, July 8th to 11th, Gardner? A. Yes, in that vicinity, yes.

Q. Now, Mr. Challman, I'm going to ask Miss Ellis to give you Mr. Gardner's call report of his visit to your plant, being Exhibit 3720, Miss Ellis, please.

(Whereupon, the clerk complied with the request.)

• • •

Q. Is it correct, Mr. Challman, as stated by Mr. Gardner, the reason that he was there, right at the top, the purpose of the call was to try an alternate forging program in an attempt to try to eliminate bending of the product; that's what was going on, wasn't it? A. Yes.



Q. Did you ever learn at any time whether the axles they were able to make on this machine were metallurgically sound in terms of their internal structure? A. No.

Q. Now, there is some mention in here of a bending of the axle that was occurring at this time; is that correct? A. Yes.

Q. Could you tell us do you know anything about what happened subsequent to this? Let me ask you this first: Bending of the axles we are referring to here is an external situation, an actual bending of the axle? A. Yes, on one of the operations it would get a kink or a dog leg in the journal portion of the axle, so instead of having a completely straight piece, it had this dog leg on the end or this kink.

Q. Now, was this being caused by some mechanical malfunctioning of the machine? A. No.

Q. What was causing it and what was done about it, if anything, after the time that you left at the end of June, 1968? A. Why, I think that is covered in more comments in this same report. Mr. Challman indicated that he wanted to think through all of the sequences of the operation and think through his dies and the whole forging technology area, and request that we consider and think about what might be done to eliminate this bending and he would call us about it later.

Q. And did you or your employees render assistance to Mr. Challman after June 21, 1968, to try to help him eliminate the bending of his axles? A. Yes. Even though this was an area that was getting into processing and forging technology and quality of product and so forth, I did permit Jim Gardner, our engineer, to return to Standard Forgings and work on this programming problem with Mr. Challman and, I believe—Mr. Challman certainly. I

don't know if there would have been other people at Standard Alliance.

Q. And Mr. Gardner rendered a report—did he render a report on July 11, 1968 on that subject matter? A. Yes, he did.

Q. And do you know what that report was? A. It was a call report.

Q. I mean the conclusion of that report? A. The conclusion of the report is that there were some changes to the programming and a change made to permit one of the peels to idle and to hold the billet during some of these operations, and the results were that the product was much straighter.



Q. Sir, you were talking about Mr. Gardner. You indicated that you never went back to the plant after June 21; is that correct, sir, of 1968? A. That's right.

Q. Mr. Gardner went back, didn't he? A. Yes.

Q. He went back in July, August and September? A. Approximately July and August. Perhaps September. I am not sure.

Q. And, sir, aside from the call report that was shown to the jury dated July 13 or 14, you don't have any memorandum, do you, of Mr. Gardner's trips in either July, August or September to the Standard Forgings Company of 1968? A. I think we have some July reports, have we not?

Q. That was the one that was a flimsy or a transparency that was shown to the jury of July, I believe, 8 to 11. I am asking you, sir, aside from that one were there any others? A. I believe there is a November report.

Q. November 1. My question, sir, was directed to July, August and September. A. Other than that one in July and November, we have seen no others. Mr. Gardner was in the plant assisting on programming in that period which he had reported.

## Joint Appendix of Exhibits—Exhibit 3700-3701

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: 397-6600 (219)

Contacts: H. Challman
W. Gruca

Summary of call: The following tapes were tried with the intent of eliminating or reducing axle bending encountered during body forging: (6-27-68)

1. Tape No. 126 at 120 SPM time 10:30 a.m. (Tape 125 is identical to tape 125 except all body forming operations are done while pushing rather than pulling) Results: Bending was more pronounced. The "dog-leg" appeared during the plunge, and more bending occurred along the pre-form. The program was stopped just after the body forming due to lack of clearance.

2. Tape No. 125 at 180 SPM time 11:00 a.m. (An attempt to establish a speed vs. bending correlation) Results: the normal bend occurred at the pre-form and possibly slightly less occurred at the body forming. There appeared to be no significant relation between—speed and bending.

3. Tape No. 129 at 120 SPM 3:45 p.m. Tape 129 rounds in normal manner, forms No. 1 journal, transfer to No. 2 peel and then forms body (pulling) with 3 passes with body finish die, and forms No. 2



journal. The No. 1 peel clamps the free end at the end of the last body pin to attempt to straighten. Results: the No. 1 journal end remains straight and pre-forming and body finishing perform satisfactorily, however the resulting "dog-leg" at the No. 2 end was not straightened by the No. 1 peel jaws.

4. Tape No. 128 at 120 SPM 4:15 p.m. (tape 128 is identical to 125 with an additional pass over the body and wheel rest with the roughing die). Results: the "dog-leg" bend re-appeared while passing over the body but to a lesser degree. The finished forging was straightr (sic).

## Joint Appendix of Exhibits—Exhibit 3720

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: (219) 397-6600

Contacts: H. Challman
W. Gruca
E. Oakland

Summary of call: Subject—Axle Forging Press The purpose of this call was to try an alternate forging program in an attempt to eliminate bending of the product. (Challman elected to delay any runs during this week of 7-1 due to the holiday and their shutdown on 7-5). The program involves turning the No. 1 peel with the No. 2 peel while both grip the product. The installation of a two-way valve was necessary to allow the No. 1 peel to free-wheel. This work was completed on 7-9 (Tues.) and some dry runs were made to check the tapes and the free-wheeling action. The program appeared satisfactory and so a decision was made to heat up the furnace and run axles on 7-10 Wed.). A total of 8 billets were run and all appeared to be straight and reasonably to size. The bending could be detected during the pre-form or body finish process and shock on the peels appeared less than normal. The ends were cut off and the 8 axles were centered and checked (last line unclear).